Volume 66
Issue 2 *Dickinson Law Review - Volume 66, 1961-1962*

1-1-1962

Recent Cases

RECENT CASES

BONFITTO v. NATIONWIDE MUTUAL INS. CO.: THE LAW OF THE CASE DOCTRINE IN PENNSYLVANIA

In the recent case of *Bonfitto v. Nationwide Mutual Ins. Co.*[1] it was held that a question adjudicated adversely to plaintiff in a prior trespass action against certain tortfeasors, which was affirmed on appeal, became the "law of the case" and was conclusive against plaintiff in a subsequent assumpsit action, arising out of the same transaction, against the insurer of one of the tortfeasors. The purpose here is to review the development of the law of the case rule in Pennsylvania, compare it to the doctrine of res judicata, and to suggest some reasons why its application in the principal case may have been unwarranted.[2]

In March 1952, Marco Bonfitto, plaintiff in the noted case, was injured when his brother, Antonio, while driving his brother Joseph's car, backed over his foot. Marco brought no action against his brothers based on the injury until September 1954, when, in answer to his complaint in trespass, his brothers set up the defense of the two-year statute of limitations[3] relative to actions for personal injuries. In reply, Marco alleged that a representative of defendants' had promised him that he would be compensated for his injuries and requested Marco to contact him when he had completely recovered; therefore, that defendants should be estopped from asserting the bar of the statute of limitations because plaintiff had relied upon the promise of their representative.[4] At trial, for the purpose of aiding the court in ruling upon a motion for judgment on the pleadings, testimony was taken concerning the grounds for the alleged estoppel.[5] Thereafter, in an opinion filed in January 1956, the court directed that judgment on the pleadings be entered

1. 195 Pa. Super. 546, 172 A.2d 176 (1961) (Flood, J., filed a dissenting opinion joined by Ervin, J.) (allocatur granted).

2. This note is not concerned with the question of whether the rule of res judicata would have been applicable in the noted case and it is assumed, arguendo, that it would have been if properly pleaded.

3. PA. STAT. ANN. tit. 12, § 34 (1953).

4. Brief for Appellees, p. 2, Bonfitto v. Bonfitto, 391 Pa. 187, 137 A.2d 277 (1958).

5. Plaintiff testified that Edgar Bell, an adjuster employed by Joseph's insurer, Nationwide Mutual Insurance Company, had visited him in May or June, 1952, and told plaintiff: "Take care of the foot. Come see me when Dr. Johnson discharge you." Plaintiff also testified that Bell had visited him in October or November, 1952, at which time Bell said: "Take care of the foot. When Dr. Johnson discharge, you come see me up at the office. I no come around no more." See Bonfitto v. Bonfitto, 10 Pa. D.&C.2d 598, 599 (1956).

for the defendants.[6] On appeal by plaintiff, the judgment was affirmed by the supreme court per curiam on the opinion of the trial judge.[7]

In May 1959, Marco brought the present action in assumpsit, based on a promissory estoppel, against Nationwide Mutual Insurance Company and its adjuster, Edgar Bell. Defendants pleaded the six-year statute of limitations relative to actions in assumpsit,[8] but did not plead the prior adjudication by way of res judicata. At trial, on an instruction that the basic issue was whether Bell made the promise, the jury returned a verdict for plaintiff. Defendants then moved for judgment n.o.v. on the grounds that (1) the issue had been determined in a prior action and (2) that the statute of limitations had run. The trial court granted the motion on the latter ground but concluded as to the prior adjudication that stare decisis[9] and law of the case were inapposite because the facts were not substantially the same in the second action.[10] It was also held that res judicata and collateral estoppel[11] could not be relied upon because they had not been pleaded in accordance with the procedural rules.[12] Plaintiff appealed, and no mention of the law of the case rule appeared in either brief. The superior court, however, affirmed the judgment solely on the ground that the "application of the rule of the law of the case prevents reconsideration of the question of estoppel previously decided adversely to . . . [appellant's] present contention."[13]

The development of the law of the case rule in Pennsylvania cannot be fully appreciated without first generally defining the rule of res judicata and

6. After finding that Bell was "doubtless without any knowledge of or authority from" the defendant tortfeasors, the court held that "defendants never committed themselves to pay anything, gave fair warning that they would not call upon plaintiff again and did not misrepresent the law of the statute of limitations." *Id.* at 600, 601.

7. Bonfitto v. Bonfitto, *supra* note 4.

8. PA. STAT. ANN. tit. 12, § 31 (1953).

9. "Stare decisis simply declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." Burke v. Pittsburgh Limestone Corp., 375 Pa. 390, 394, 100 A.2d 595, 598 (1953).

10. At the trial of the second case plaintiff testified that Bell had told him "insurance company pay for the time and the doctor bill" when Bell first visited plaintiff. As to the conversation on Bell's subsequent visit, plaintiff testified that Bell told him "insurance company pay for the time and the doctor bill, what the policy call [for] and no more." The plaintiff's testimony was corroborated by two other witnesses. See Brief for Appellee Bell, pp. 3-4, Bonfitto v. Nationwide Mutual Ins. Co., *supra* note 1.

11. The trial court treated the rule of res judicata and collateral estoppel as separate doctrines. Collateral estoppel is treated in this Note as part of the rule of res judicata.

12. PA. R. CIV. P. 1030 provides that "all affirmative defenses including but not limited to . . . res judicata . . . shall be pleaded in a responsive pleading under the heading 'New Matter.'" PA. R. CIV. P. 1032 provides that "a party waives all defenses and objections which he does not present either by preliminary objection, answer or reply . . . ."

13. Bonfitto v. Nationwide Mutual Ins. Co., *supra* note 1, at 550-51, 172 A.2d at 178.

its effect upon subsequent controversies. The rule of res judicata may be stated generally as follows:

> Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.[14]

The rule of res judicata has four general effects on subsequent litigation. It will *bar* a second suit by the plaintiff on the same cause of action if the prior judgment was for defendant.[15] If the prior judgment was for plaintiff in an action for the recovery of money, his original cause of action is *merged* into the judgment and extinguished, a claim on the judgment being substituted therefor.[16] Under the *collateral estoppel* effect of the rule, questions of law or of fact which were actually litigated in the prior suit are binding in a subsequent suit between the parties on a different cause of action.[17] Pennsylvania courts have extended the application of the collateral estoppel effect to include questions of fact which *might* have been litigated in the prior action and, in certain cases, to questions of law which might have been litigated therein.[18] Finally, the *direct estoppel* phase of the rule prescribes that where a final judgment not on the merits has been rendered for the defendant, those matters actually litigated and determined in the prior action are binding on a second action between the parties on the same cause of action.[19]

While the rule of res judicata has been erected to achieve finality where there has been a final judgment,[20] the law of the case rule seems to have sprung from a desire to impart finality to matters considered and decided in an appellate proceeding wherein no final judgment had been rendered. Though not a child of the twentieth century,[21] the law of the case rule

14. RESTATEMENT, JUDGMENTS § 1 (1942). This Section was cited with approval in Burke v. Pittsburgh Limestone Corp., *supra* note 9, with the comment that the Pennsylvania rule is broader in that it precludes relitigation of every fact which might have been considered in reaching the former determination.

15. RESTATEMENT, JUDGMENTS § 48 (1942) and cases collected in RESTATEMENT, JUDGMENTS § 48 (Pennsylvania Annotations 1957) [Hereinafter cited as *Pa. Anno.*].

16. RESTATEMENT, JUDGMENTS § 47 (1942) and cases collected in *Pa. Anno.* § 47.

17. RESTATEMENT, JUDGMENTS §§ 68 (questions of fact), 70 (questions of law) (1942). Pennsylvania cases do not readily lend themselves to the distinctions drawn by the Restatement between questions of fact and of law: See *Pa. Anno.* § 70.

18. See *Pa. Anno.*, General Principles, pp. 21-22.

19. RESTATEMENT, JUDGMENTS §§ 45, comment *d*, 49 (1942) and cases collected in *Pa. Anno.* § 49, comment *b*.

20. RESTATEMENT, JUDGMENTS § 41 (1942) (res judicata does not apply where the judgment is not final) and cases collected in *Pa. Anno.* § 41.

21. See exhaustive annotation on the subject in 34 L.R.A. 321 (1896) in which the following Pennsylvania cases were cited as law of the case decisions, all of which were second appeals in the same case after a prior appeal had resulted in a reversal

was not fully enunciated by a Pennsylvania court until 1938 when it was declared in *Reamer's Estate*[22] in the following words:

> The doctrine of the "law of the case" is that, when an appellate court has considered and decided a question submitted to it upon appeal, it will not, upon a subsequent appeal on another phase of the same case, reverse its prior ruling even though convinced that it was erroneous.[23]

Prior to the definitive statement of the rule in *Reamer's Estate*, and to some extent since then, the law of the case rule seems to have been confused by Pennsylvania courts with the various applications of the rule of res judicata. Much of the confusion is traceable to the early case of *Marsh v. Pier*,[24] wherein it was stated:

> But a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed.[25]

Though it seems quite obvious that *Marsh v. Pier* involved a simple application of the doctrine of res judicata, and equally apparent that the court's use of the term "law of the case" was meant to denote no rule differing from res judicata, the above-quoted passage became the basis for a chain of decisions in which various effects of the rule of res judicata were described as the "law of the case."

First came *Bolton v. Hey*[26] wherein the court quoted and applied the supposed "law of the case" rule of *Marsh v. Pier*, though again the circumstances of the case required the application of no rule differing from res

---

and new trial: Carpenter v. United States Life Ins. Co., 174 Pa. 636, 34 Atl. 211 (1896); Mechanics & Traders Bank v. Seitz Bros., 155 Pa. 191, 26 Atl. 209 (1893); Ulmer v. Ryan, 137 Pa. 309, 20 Atl. 705 (1890); Collins v. Barnes, 130 Pa. 356, 18 Atl. 645 (1889); Brandon v. Fritz, 94 Pa. 88 (1880).

22. 331 Pa. 117, 200 Atl. 35 (1938).

23. *Id.* at 122, 200 Atl. at 37. See generally 5B C.J.S. *Appeal & Error* §§ 1821-1835 (1958); 21 C.J.S. *Courts* § 195 (1940); 9 Standard Pa. Practice ch. 38, §§ 520-524 (1936); AM. JUR. *Appeal & Error* §§ 985-1001 (1936); 2 P.L.E. *Appeals* § 347 (1957); *Pa. Anno.* § 41, comment *c* (1957).

24. 4 Rawle 273 (Pa. 1833) (A final judgment of a New York trial court in a suit between plaintiff and defendant's predecessor in interest is conclusive in subsequent action concerning same subject matter).

25. *Id.* at 289.

26. 168 Pa. 418, 31 Atl. 1097 (1895) (Supreme court's dismissal on prior appeal of sci. fa. sur mechanic's lien on ground plaintiff had, by contract as then construed, waived right to file lien, bars alias sci. fa. on same cause, though in interim supreme court had applied different construction to similar contracts in other decisions). This case is cited in *Pa. Anno.* § 48 (1957) as an example of the res judicata "bar" effect.

judicata. Then, in *Bell v. Allegheny County*,[27] the court again relied upon the *Marsh v. Pier* rule but described it as "language of this court . . . on the rule of res judicata."[28] *Raisig v. Graf*[29] followed, relying on both the *Bolton*[30] and *Marsh*[31] cases. *Devine's Estate*,[32] in the same year, was decided primarily on the basis of an estoppel in pais, though both *Bolton v. Hey* and *Marsh v. Pier* were alluded to in the opinion of the court below which was affirmed per curiam by the supreme court.

Next in the series came *Pulaski Avenue*[33] wherein *Bolton v. Hey* was relied upon though again res judicata alone would have been adequate to dispose of the case.[34] Perhaps feeling the necessity for explaining the application of the purported "law of the case" rule where there had been no appeal from the prior judgment, the court indulged in the following reasoning: "The order of the court below . . . was not excepted to or appealed from . . . and is as binding and conclusive as if an appeal had been taken and the order had been affirmed by this court. The decision, therefore, is the law of the case."[35]

27. 184 Pa. 296, 39 Atl. 227 (1898) (In prior suit, affirmed on appeal, it was held that plaintiff was entitled under a special statute fixing salary at $4500 per year in Allegheny County instead of a general statute fixing salary at $10,000 per year. In later suit for salary accruing during subsequent months, prior judgment is conclusive as to issue of which statute applies). This case is cited in *Pa. Anno.* § 68, comment *c* (1957) as an example of collateral estoppel effect.

28. *Id.* at 306, 39 Atl. at 230.

29. 17 Pa. Super. 509 (1901) (Judgment for defendant in prior assumpsit action, though failing to include one item, "bars" later action for same item though prior decision was erroneous. Prior decision had not been appealed). This case is cited in the Scope Note of the *Pa. Anno.* as an example of a Pennsylvania case wherein the principles of res judicata and law of the case have been treated indiscriminately.

30. Bolton v. Hey, *supra* note 26.

31. Marsh v. Pier, *supra* note 24.

32. 199 Pa. 250, 48 Atl. 1072 (1901) (One Naglee died in 1836 and in identically-worded devises left real property to his daughter Williams and other real property to his daughter Devine. Williams took two cases to the supreme court, in 1856 and 1859, in which it was held that she took a fee simple in the property devised her. Upon death of Devine, Williams claimed to share in the proceeds of her estate on the ground that Devine took only a life interest in the property devised to her. Orphans' court, in dismissing Williams' exception to their adjudication, held that she was "clearly estopped" from bringing a contrary assertion to that successfully contended in her prior suits).

33. 220 Pa. 276, 69 Atl. 749 (1908) (Order of common pleas quashing petition for appointment of viewers to assess damages for vacation of a street, from which no appeal was taken, is conclusive in later petition, brought eleven years later, for a rule to show cause why the former petition should not be reinstated, though the supreme court in the interim has declared the law in a contrary sense to that upon which the prior order was based).

34. This case may be placed in accord with many other cases standing for the proposition that although a judgment is erroneous, equitable relief will not be granted to a party thereto on the sole ground that the judgment was the result of a mistake of law. The case is cited for that proposition in *Pa. Anno.* § 126(2)(c) I.

35. Pulaski Avenue, *supra* note 33, at 280, 69 Atl. at 751. The court may also have intended to emphasize by that statement that a final judgment rendered by a lower court, from which no appeal has been taken, is no less conclusive than a judgment affirmed on appeal. See 20 P.L.E. *Judgment* § 274 (1959).

In any event, there seems to be little doubt but that the term "law of the case" was, at this stage, a mere synonym for "res judicata."

The *Marsh v. Pier* line of decisions continued with *Lafferty's Estate*[36] in which the opportunity was perhaps presented to distinguish the law of the case rule from the rule of res judicata. The court, however, relied for their authority upon the above cases[37] in which res judicata had been applied *sub nomine* the "law of the case," and one additional decision[38] in which res judicata had been pleaded and applied without mention of the purported "law of the case" rule then in vogue.

One might well have believed that the confusion in doctrine or terminology in the application of the rules would have been terminated by the more detailed enunciation of the law of the case rule in *Reamer's Estate*.[39] Certain distinctions were there drawn between the law of the case rule and res judicata, and the necessity of a prior appellate consideration for the application of the law of the case rule was made apparent. However, the indiscriminate use of the terms was continued in *Schroeder Estate*[40] where the court said, in describing the effect of two prior, unappealed orphans' court decisions, that "the matter is now res adjudicata . . . and became the law of the case."[41] Finally, to bring the development of *Marsh v. Pier*[42] to full circle, the effect of the rule of res judicata was again described as the "law of the case" in *Clarendon V.F.W. Home Ass'n Liquor License Case*,[43] and the oft-quoted passage from *Marsh v. Pier*, which had been designated more than a half-century earlier as "language of the Court . . . on the rule of res judicata,"[44]

36. 230 Pa. 496, 79 Atl. 711 (1911) (Prior orphans' court decree, affirmed on appeal, holding that a power of appointment had been validly exercised, is conclusive as to that issue on appeal from later decree in same estate under same will).

37. The cases relied upon were Pulaski Avenue, *supra* note 33; Bell v. Allegheny County, *supra* note 27; Bolton v. Hey, *supra* note 26; and Marsh v. Pier, *supra* note 24.

38. Allen v. Int'l Text Book Co., 201 Pa. 579, 51 Atl. 323 (1902) (Judgment for plaintiff in prior suit between same parties for an installment of salary after allegedly wrongful discharge of plaintiff, is conclusive as to the question of wrongfulness in second suit for later installments). This case is cited in *Pa. Anno.* § 68, comment *c*, I, as an example of collateral estoppel.

39. *Supra* note 22.

40. 352 Pa. 170, 42 A.2d 617 (1945) (Construction of will in two prior adjudications by the orphans' court, from which no appeals had been taken, is "res judicata" in later audit of trustee's account under "law of the case" rule).

41. *Id.* at 171, 42 A.2d at 617-18.

42. *Supra* note 24.

43. 167 Pa. Super. 44, 75 A.2d 171 (1950) (Prior unappealed common pleas decision, reversing Pa. Liquor Control Bd.'s denial of license to applicant, and holding that the statutory quota provisions do not apply to clubs, is conclusive as the "law of the case" in later proceeding on rule to show cause why prior order should not be reversed, though supreme court in interim has construed statute to the contrary). This case is cited in *Pa. Anno.* § 126(2)(c), I, for proposition that equitable relief will not be granted from a judgment merely because erroneous.

44. *Supra* note 28.

was described as "the classic statement of the principle [of the law of the case]."[45]

One can only wonder how the same passage from *Marsh v. Pier*[46] can be said to enunciate two rules which are supposedly distinguishable. A possible explanation lies in the fact that the law of the case rule as defined in *Reamer's Estate*[47] bears little resemblance to the rule applied in the cases therein cited as "the leading cases in Pennsylvania involving the doctrine of the law of the case."[48] Four of those cases are directly traceable to the *Marsh v. Pier* definition of the supposed "law of the case" rule. *Bolton v. Hey*[49] was not "a subsequent appeal on a later phase of the same case" but an appeal in a second suit between the same parties on the same cause of action. In *Pulaski Avenue*[50] there had been no prior appellate consideration of the case.[51] The prior decisions discussed in *Devine's Estate*,[52] though they had been appealed to the supreme court, were decisions involving different parties and different causes of action and could in no way be termed prior appeals in the same case. *Lafferty's Estate*[53] might today be considered a correct application of the law of the case doctrine, though the cases there relied upon would indicate that the rule there invoked was indistinguishable from the rule of res judicata. *Bailey's Estate*,[54] though not mentioning the law of the

45. *Supra* note 43, at 48, 75 A.2d at 173.

46. See quotation accompanying note 25 *supra*.

47. See quotation accompanying note 23 *supra*.

48. 331 Pa. 117, 124, 200 Atl. 35, 38 (1938). The cases cited as leading cases were Ottman v. Albert Co., 327 Pa. 49, 192 Atl. 897 (1937); Bailey's Estate, 291 Pa. 421, 140 Atl. 145 (1928); Lafferty's Estate, *supra* note 36; Pulaski Avenue, *supra* note 33; Devine's Estate, *supra* note 32; and Bolton v. Hey, *supra* note 26.

49. *Supra* note 26.

50. *Supra* note 33. Several other purported law of the case decisions reveal that the rule has been applied where there had been no appeal from the prior adjudication: Strauss v. W. H. Strauss & Co., 328 Pa. 72, 194 Atl. 905 (1937) (Where mortgagee gets small deficiency judgment because mortgagor is given substantial credit for value of realty under Deficiency Judgment Act, mortgagee, having failed to appeal from former judgment, is precluded, on later filing of claim in bankruptcy proceeding against mortgagor, by the "law of the case" from collaterally attacking such judgment, though the Act was declared unconstitutional in the interim); Gould's Estate, 270 Pa. 535, 113 Atl. 552 (1921) (Construction of will adopted by auditing judge in a prior adjudication, to which no exceptions were taken nor appeal filed, becomes the "law of the case" and is "res judicata" as to subsequent distributions arising from the same fund or parts of the fund affected by the prior adjudication).

51. One writer has advanced the sensible argument that the use of the term "law of the case" to describe the binding effect of a trial court ruling not excepted to or appealed from is based on the conduct of a party in failing to preserve the question and on the limited reviewing function of the appellate court: Note, 62 HARV. L. REV. 286, n.1 (1948).

52. *Supra* note 32.

53. *Supra* note 36.

54. *Supra* note 50 (Where the supreme court has, in two prior appeals, passed finally on matters contained in a given litigation, a bill of review will not lie in the court below for errors of law appearing in the judgment or decree).

case rule, was a decision on a subsequent appeal on a later phase of the same case and as such bears out the defined limits of the rule. In the remaining case, *Ottman v. Albert Co.*,[55] a judgment for defendant, not on the merits, intervened between the first and second appeals. As such, it would seem that the direct estoppel phase of the rule of res judicata would have been adequate to dispose of the issues.

The reader may well inquire at this point as to the real origin of the law of the case rule as defined in *Reamer's Estate*. Some assistance in answering that question may be found in *Rex v. Lehigh Valley Transit Co.*[56] which was decided in the same year as the *Reamer* case. The court in the *Rex* case was faced with the second appeal in the same case after a prior appeal in the superior court had resulted in a reversal and an award of a new trial. The court referred to rulings made on the prior appeal as the "law of the case" and cited as its first of four authorities the California case of *Westerfield v. New York Life Ins. Co.*,[57] in which it was stated:

> The doctrine of the law of the case is this: That where upon an appeal the Supreme Court, in deciding the appeal, states in its opinion a principle or rule necessary to the decision, that principle or rule becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . .[58]

It appears that from the similarity in the above statement of the law of the case rule to that in *Reamer's Estate*, and from the fact that the *Rex* case was handed down shortly before the *Reamer* decision, the *Westerfield* case's definition of the "law of the case" rule may have exercised some influence in formulation of the rule in *Reamer*. But even the *Rex* case was not free from confusion between the two rules, for, of the other three cases there cited as "law of the case" authority, both *Swissvale Borough v. Dickson*,[59] and *State Hospital for Criminal Insane v. Consol. Water Supply Co.*,[60] stand for the proposition that the *judgments* of the superior court are *res judicata* on an appeal to the supreme court in a *subsequent suit* between the same parties involving the same subject matter. The remaining case relied upon, *Thaler*

55. *Supra* note 48 (On prior appeal, summary judgment for defendants on a statutory demurrer was reversed and the case remanded for trial with the holding that plaintiff's statement of claim made out a prima facie case. At trial it appeared that there had been a misjoinder of a party defendant and judgment was entered for defendants, without prejudice. Plaintiff instituted the present suit and, on appeal from judgment entered on a directed verdict for plaintiff, questions decided upon the prior appeal were not reconsidered).

56. 330 Pa. 257, 199 Atl. 324 (1938).

57. 157 Cal. 339, 107 Pac. 699 (1910).

58. *Id.* at 341, 107 Pac. at 700.

59. 269 Pa. 19, 112 Atl. 120 (1920).

60. 267 Pa. 29, 110 Atl. 281 (1920).

Bros. v. Greisser Constr. Co.,[61] though not mentioning the "law of the case," was suitable for its application.

Perhaps the apparent confusion in the development of the law of the case rule in Pennsylvania may be attributed to semantic difficulties. For, if the terms "res judicata" and "law of the case" are used merely to denote that a particular issue is "a matter adjudged,"[62] it would not seem highly improper to consider them substantially synonymous. For example, a question of law considered and decided in a prior suit between the parties may become, under the collateral estoppel effect of the rule of res judicata, a principle of law which will be applied in a subsequent suit between the same parties. As such, it might be said that it is the "law of the case" in that subsequent suit. It is probable that many of the Pennsylvania cases using the term "law of the case" intended it in that sense. Confusion arises, however, when the use of the term "law of the case" is misunderstood to denote the rule which underlies the term, for the rules of res judicata and law of the case differ markedly in the requirements for their application and in their effect.[63]

The essential differences between the two rules are four in number: (1) the nature of the *prior* adjudication needed for each to apply; (2) the *degree* of conclusiveness each imparts to the prior decision; (3) the *scope* of matters foreclosed from relitigation; and (4) the nature of the *subsequent* litigation in which they may be applied.

As to the initial general difference, the rule of res judicata requires that the prior adjudication must have resulted in a final judgment,[64] regardless of the level of the court finally disposing of the suit.[65] Law of the case, on the other hand, requires no final judgment—only that an appellate court has "considered and decided a question submitted to it on appeal." For example, the law of the case rule has been expressly applied to render conclusive on a subsequent appeal in the same case all matters considered and decided on a prior appeal which resulted in a remand for trial[66] or retrial.[67] The same effect has been accomplished in many like cases without mention of the law of the case rule or citation of authority, the court apparently feeling that there

61. 229 Pa. 512, 79 Atl. 147 (1911) (Where on previous appeal to superior court certain issues as to validity of notice of a lien and of the lien itself were considered, those issues will be treated as finally disposed of on appeal from judgment entered after retrial, where the facts before the superior court were substantially the same as on subsequent appeal).

62. BLACK, LAW DICTIONARY (3d ed. 1933).

63. "Res judicata settles the rights of the parties once the judgment has become final. Law of the case does not settle any rights; it merely settles the law according to which rights will be decided until the judgment is final." Note, 5 STAN. L. REV. 751, 754 (1953).

64. RESTATEMENT, JUDGMENTS § 41 (1942) and cases collected in *Pa. Anno.* § 41.

65. 20 P.L.E. *Judgment* § 274 (1959).

66. Commonwealth by Truscott v. Binenstock, 366 Pa. 519, 77 A.2d 628 (1951).

67. Givens v. W. J. Gilmore Drug Co., 340 Pa. 361, 17 A.2d 184 (1941).

was no need for extended discussion of matters decided on the prior appeal where there had been no change in the law during the interim.[68] In other cases, though the rule has not been expressly applied, the appellate tribunal has refused to reconsider questions on an appeal from the lower court's entry of a decree[69] or judgment[70] in accordance with the opinion of the appellate court rendered on a prior appeal in the same case.

The above is not intended to imply that the law of the case rule is not applicable where the prior proceeding resulted in a final judgment as to *part* of the matter concerned in the whole litigation. It has expressly been so applied in cases involving subsequent accounts where there had been a prior confirmation of a partial account or other final adjudication as to a question of law arising earlier in the same estate.[71]

The doctrines of res judicata and law of the case seem to overlap the some extent where there has been a prior appellate proceeding in the same case wherein a final judgment or decree has been rendered as to part of the subject matter in litigation. The rule of res judicata would seem as applicable in such a case[72] as would the law of the case rule defined in *Reamer's Estate.* The law of the case rule as there defined does not expressly exclude the application of the rule where there had been a final judgment or decree rendered on the prior appeal as to part of the matter involved in the whole litigation. But, if the rule of res judicata may be invoked in such a case, the necessity for also considering the law of the case rule applicable seems questionable.

Concerning the second general difference between the two rules, *i.e.*, the degree of conclusiveness each imparts, where the rule of res judicata applies, a valid judgment may not be attacked collaterally on the ground that it was the result of an error of law.[73] But the law of the case rule is subject to the following exception to its conclusiveness:

> [The law of the case rule] does not have the finality of the doctrine of *res judicata.* "The prior ruling may have been followed as the

68. Eaton v. New York Life Ins. Co., 318 Pa. 532, 179 Atl. 67 (1935); Welker v. Hazen, 247 Pa. 122, 93 Atl. 173 (1915); Thaler Bros. v. Greisser Const. Co., *supra* note 61; Collins & Wood v. Busch, 15 Pa. Super. 255 (1900).

69. Hockfield v. Woloderker Bldg. & Loan Ass'n, 86 Pa. Super. 462 (1925).

70. Vulcanite Paving Co. v. City of Philadelphia, 244 Pa. 80, 90 Atl. 456 (1914); Wray, Moore & Co. v. American Ry. Express Co., 77 Pa. Super. 486 (1921).

71. King's Estate, 361 Pa. 629, 66 A.2d 68 (1949); Reamer's Estate, *supra* note 48; Lafferty's Estate, 230 Pa. 496, 79 Atl. 711 (1911).

72. RESTATEMENT, JUDGMENTS § 41, comment *c* (1942) states that res judicata applies where the judgment is final as to some matters in litigation although the litigation continues as to others. For cases holding that determinations of fact in partial adjudications are conclusive in subsequent accounts, and other cases holding that prior adjudications on questions of law arising in a prior partial account create no estoppel for later accounts, see *Pa. Anno.* § 41, comment *c*, pp. 232-33.

73. RESTATEMENT, JUDGMENTS § 126(2)(e) (1942) and cases collected in *Pa. Anno.* § 126(2)(e).

> law of the case but there is a difference between such adherence and *res judicata*; one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission." . . . The rule of the "law of the case" is one largely of convenience and public policy, both of which are served by stability in judicial decisions, and it must be accommodated to the needs of justice by the discriminating exercise of judicial power. Thus . . . where a prior decision is palpably erroneous, it is competent for the court, not as a matter of right but of grace, to correct it upon a second review where no wrong or injustice will result thereby, where no rights of property have become vested, where no change has been made in the status of the parties in reliance upon the former ruling, and where, following the decision on a former appeal, the court in another case has laid down a different rule either expressly or by necessary implication overruling the prior decision.[74] (Emphasis the court's.)

As to differences in the scope of matters concluded by each rule, the Pennsylvania application of the res judicata rule forecloses relitigation of all matters which were[75] or, in some cases, which might[76] have been considered and decided in reaching the prior decision. Law of the case, however, forecloses relitigation only of those matters which have been actually considered and decided on prior appeal.[77] In addition, where the law of the case rule applies, matters considered and decided on the prior appeal are conclusive only where the evidence is substantially the same as on the prior appeal.[78]

The fourth area of difference between the two rules, and the crucial difference insofar as the noted case is concerned, is as to the nature of the subsequent litigation in which each rule is applicable. Res judicata applies to future suits between the same parties or their privies on the same or different cause of action and, in certain situations, to later proceedings in the same case wherein a prior, partial judgment or decree has been rendered. But by definition, it would appear that the law of the case rule would not be appropriate in a second suit between the same parties—only in a subsequent appeal on a later phase of the *same case*.[79] Consequently, unless the appeal in the noted case of *Bonfitto v. Nationwide Mutual Ins. Co.*[80] can be

74. Reamer's Estate, *supra* note 48, at 122-23, 200 Atl. at 37-38.

75. See cases collected in *Pa. Anno* § 70.

76. See cases collected in *Pa. Anno.*, General Principles, pp. 21-22.

77. Reamer's Estate, *supra* note 48; see Fogel Refrigerator Co. v. Oteri, 398 Pa. 82, 156 A.2d 815 (1959); Welker v. Hazen, *supra* note 68; Creachen v. Bromley Bros. Carpet Co., 214 Pa. 15, 63 Atl. 195 (1906); Cowen v. Pennsylvania Plate Glass Co., 188 Pa. 542, 41 Atl. 615 (1898).

78. See Thaler Bros. v. Greisser Constr. Co., *supra* note 61; Creachen v. Bromley Bros. Carpet Co., *supra* note 77.

79. See quotation accompanying note 23 *supra*.

80. 195 Pa. Super. 546, 172 A.2d 176 (1961).

considered a subsequent appeal on a later phase of the case of *Bonfitto v. Bonfitto*,[81] the application of the law of the case rule in the former would appear erroneous. While there seem to be no Pennsylvania appellate decisions directly in point on the question of whether the law of the case rule applies to preclude litigation of issues arising in a second and separate suit between the parties, the decision in *Burke v. Pittsburgh Limestone Corp.*[82] offers some persuasion that it does not.[83]

In the prior suit involved in the *Burke*[84] case, a final and valid judgment had been rendered for the defendant which was affirmed by both the superior and supreme courts. Thereafter, the supreme court handed down a decision in a different case involving a similar issue and stated that their holding in the first *Burke* case (among others) was out of line with the rational foundation of its decisions but that, because of stare decisis, would not be overruled. The Burkes then brought a petition for a declaratory judgment against the administrator of the estate of the defendant in the prior case, contending that the intervening decision had changed the law applicable to their controversy and, therefore, that they were entitled to judgment. They were met by the defense of res judicata. From a trial court judgment for defendants, the Burkes appealed to the supreme court. On appeal, they contended that theirs was such a situation as would come under the exception to the conclusiveness of the "law of the case" rule[85] and, therefore, that it would be competent for the supreme court to reconsider the conclusions reached on the prior appeal.[86] The appellee argued to the contrary that only res judicata was applicable and not the law of the case rule because the latter only applies to "the still pending proceedings" and "within the four corners of a particular litigation."[87] The supreme court, in affirming the judgment for defendants, stated that "the argument of the appellants confuses the rule of stare decisis, law of the case, and res judicata;"[88] that "the court is without authority to refuse to apply the doctrine"[89] of res judicata,

81. 391 Pa. 187, 137 A.2d 277 (1958).

82. 375 Pa. 390, 100 A.2d 595 (1953).

83. *Pa. Anno.* § 41, comment *c*, at p. 222, states: "The term 'law of the case' is commonly applied to a specie of *res judicata*, which renders a prior or preliminary adjudication conclusive in later litigation *in the same proceeding*." 2 FREEMAN, JUDGMENTS § 630 (5th ed. 1925) states: "The doctrine of 'law of the case' relates entirely to questions of law and is confined in its operation to subsequent proceedings in the same case. . . ." For cases in other jurisdictions supporting the proposition that the law of the case is not carried into subsequent cases, see 21 C.J.S. *Courts* § 195, n.20 (1940); 5B C.J.S. *Appeal & Error* § 1821, n.58 (1958).

84. *Supra* note 82.

85. See quotation accompanying note 74 *supra*.

86. Brief for Appellants, p. 23, Burke v. Pittsburgh Limestone Corp., *supra* note 82.

87. Brief for Appellees Kerr *et al.*, p. 5, Burke v. Pittsburgh Limestone Corp., *supra* note 82.

88. Burke v. Pittsburgh Limestone Corp., *supra* note 82, at 394, 100 A.2d at 598.

89. *Id.* at 395, 100 A.2d at 598.

and that "any mistakes in the original judgment are wrapped up in that judgment and cannot be inquired into thereafter."[90]

Admittedly, the supreme court in the *Burke* case did not specifically state that the law of the case rule *could* not be applied on an appeal in a subsequent suit between the same parties or their privies. It is also arguable that the *Burke* case supports with equal force the proposition that though the rule of the law of the case may apply in a second suit between the parties, it would be superseded by the rule of res judicata where that rule may also be applied. In addition, as has already been pointed out, the term "law of the case" has been used in several Pennsylvania cases to describe the effect of a decision reached in a prior case between the parties. But it is submitted that the use of the term in those cases was as a synonym for "res judicata" in the sense that that term is used to denote "a matter adjudged."

Moreover, none of the cases relied upon by the majority in *Bonfitto v. Nationwide Mutual Ins. Co.*[91] can be said to be authority for the proposition that the law of the case rule extends to foreclose litigation of issues in a subsequent suit between the same parties. Five of the cases there relied upon were subsequent appeals in the same case on another phase of the same case.[92] The remaining three cases are distinguishable as res judicata cases.[93]

In conclusion, it is submitted that there are several logical reasons why the law of the case rule should not be extended to foreclose litigation of questions arising in a subsequent suit between the same parties. First, the extent of the application of the doctrine as defined in *Reamer's Estate* is that it is appropriate in "subsequent appeal(s) on another phase of the *same* case." Unless those words are to be relegated to the status of idle judicial chatter, they would seem to exclude the application of the rule to foreclose

90. *Id.* at 397, 100 A.2d at 599.

91. *Supra* note 80.

92. These cases were Commonwealth by Truscott v. Binenstock, *supra* note 66; Welker v. Hazen, *supra* note 68; Thaler Bros. v. Greisser Constr. Co., *supra* note 61; Lafferty's Estate, *supra* note 71; Creachen v. Bromley Bros. Carpet Co., *supra* note 77.

93. These cases were Girard Trust Co. v. City of Philadelphia, 359 Pa. 319, 59 A.2d 124 (1948) (On appeal in prior suit by city for taxes claimed for year 1937, supreme court held that the company was not liable for the tax. In this later suit by the company, to recover 1934-1936 taxes, the ruling on appeal in the prior case that company was not liable for the tax in 1937 is conclusive as to their liability for taxes in 1934-1936. This case is cited in *Pa. Anno.* § 68, comment *c*, IV, as an example of collateral estoppel); Allen v. Pennypacker, 302 Pa. 495, 153 Atl. 734 (1931) (On appeal from rule absolute for attachment for contempt, prior supreme court decree finding appellant a trustee *ex malificio* is conclusive as to that issue. This case is cited in *Pa. Anno.* § 47, comment *i*, for the proposition that a judgment may not be attacked collaterally in proceedings for its enforcement); McMahon's Estate, 215 Pa. 10, 64 Atl. 321 (1906) (On appeal, in estate of appellant's mother, from refusal of orphans' court to stay proceedings until title to real property could be determined by an action at law, dismissal of prior appeal by same party from an order overruling a motion to quash proceedings in partition of same property in appellant's father's estate, is conclusive as a "prior adjudication").

consideration of questions arising in subsequent cases between the parties. Second, the law of the case rule does not seem to have been created with the *intent* that it should operate to preclude consideration of questions arising in subsequent suits. A conclusion to the contrary would imply that the law of the case rule was erected not only to fill a gap left by the rule of res judicata, but was also meant to fulfill the idle purpose of overlapping into areas wherein the rule of res judicata was perfectly adequate to accomplish the desired result. Third, assuming that the law of the case rule is applicable regardless of whether the prior decision had been appealed, and that it may be invoked in a subsequent suit between the parties, the rules of civil procedure requiring that res judicata be affirmatively pleaded would be completely emasculated. Fourth, assuming that the law of the case rule may be applied only where there had been a prior appellate decision, and that the rule could be extended to subsequent suits between the parties, the anomalous result would be that the court could *not* grant review as a matter of grace where the former decision had *not* been appealed, but where the prior decision *had* been affirmed on appeal, it *would* be competent for the court to grant review. Fifth, if the law of the case rule was intended to be extended to subsequent cases, why was it not required to be pleaded by the procedural rules, in like manner as res judicata?

ROBERT R. RICE

PICHIRILO v. GUZMAN: RIGHTS OF A LONGSHOREMAN FOR UNSEAWORTHINESS IN A DEMISE CHARTER

A recent decision of the United States Court of Appeals for the First Circuit, sitting in admiralty, vacated a decision of the District Court of Puerto Rico imposing liability upon a shipowner for injuries incurred by a longshoreman, resulting from the alleged unseaworthiness of the ship on which he was working at the time of the injury. The case, *Ruiz Pichirilo v. Maysonet Guzman*,[1] involved a demise charter[2] under which the demisee, who was also the libellant's employer, had maintained complete control of the ship for some five years prior to the accident.[3] The ship, the M/V *Carib*, was being unloaded at San Juan, Puerto Rico, when the injury occurred. A shackle supporting a boom of the ship broke, causing the boom to fall on the libellant, who was working on deck at the time. The evidence showed that the shackle had been recently bought.

The libel was brought in rem[4] against the *Carib* and in personam against the shipowner[5] for unseaworthiness arising ostensibly from the defective condition of the shackle. The District Court found the vessel to be unseaworthy as alleged and imposed liability on the ship and the vessel owner, Pichirilo.[6] On appeal, the Circuit Court, in an opinion by Judge Aldrich, vacated the judgment below and remanded with orders to dismiss, holding that the libel in personam was barred because the unseaworthy condition obtained after

1. 290 F.2d 812 (1st Cir. 1961), *cert. granted*, — U.S. —, 82 Sup. Ct. 176 (1961) (No. 358).

2. In a demise charter, as distinguished from a time or voyage charter, command, possession, and navigation of the vessel are vested solely in the demisee. This arrangement is analogous to a lease of real property wherein the exclusive right to possession is in the lessee, the lessor retaining only a reversion. It has been stated:

> The test is one of "control"; if the owner retains control over the vessel, merely carrying the goods furnished or designated by the charter, the charter is not a demise; if the control of the vessel itself is surrendered to the charterer, so that the master is his man and the ship's people are his people, then we have to do with a demise.

GILMORE AND BLACK, THE LAW OF ADMIRALTY § 4-21 (1957).

3. The District Court had ruled that no demise existed, but the Circuit Court, considering that ruling clearly erroneous, held that a demise was established by the evidence. Pichirilo v. Guzman, *supra* note 1, at 813. That a demise charter did exist is assumed herein; however, on appeal, the issue of the propriety of the Circuit Court's ruling will be before the Supreme Court.

4. The maritime in rem proceeding is unique in that it is literally a suit "against the ship," the vessel itself being considered a distinct party defendant. Furthermore, an action in rem will lie only when the subject of the claim is a maritime lien, such as an action for seaman's wages or an action based on the unseaworthiness of a ship. See Todd Shipyards Corp. v. City of Athens, 83 F. Supp. 67 (D. Md. 1949); GILMORE AND BLACK, *op. cit. supra* note 2, §§ 9-1 to 9-4.

5. Libellant Guzman, who had received a compensation allowance from the State Insurance Fund pursuant to the Puerto Rico Workmen's Compensation Act, 11 L.P.R.A. ch. 1 (1935), was thereby precluded from bringing any action against his employer, the demisee.

6. Guzman v. M/V Carib, Admiralty No. 39-58, D. Puerto Rico, Oct. 16, 1959.

the demise, and that the libel in rem failed in the absence of any personal liability. This Note will consider these holdings in light of the development and ramifications of the doctrine of unseaworthiness.

In its origin, the doctrine of unseaworthiness was merely a device enabling insurers to avoid indemnifying owners for the loss of ships and goods at sea.[7] The initial application to seamen occurred in cases of desertion of vessels or abandonment of ships' duties by crew members, such derelictions normally being punishable by forfeiture of wages. Upon a showing that the vessel was unseaworthy, the seamen were permitted to recover wages due.[8] The next step involved the famous "second proposition" of *The Osceola*,[9] an unprecedented dictum that a ship and its owner would incur liability to indemnify a seaman for personal injury resulting from the unseaworthiness of the ship. The nature of such an indemnity was subsequently clarified by Judge Augustus N. Hand in *The Scandrett*,[10] an action for personal injury based on unseaworthiness in the absence of negligence.[11] Reviewing the authorities, Judge Hand concluded that the duty to furnish a seaworthy ship was absolute.[12] This evolution constitutes a remarkable example of common law growth and change, if not "a frank excursion into

7. 1 CAINES, AN ENQUIRY INTO THE LAW MERCHANT OF THE UNITED STATES 308 (1802).

8. See Dixon v. The Cyrus, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789).

9. 189 U.S. 158 (1903). The four "propositions," stated in the opinion, *supra* at 175, are substantially as follows: (1) that the vessel and its owner are liable for any sickness or injury of a seaman to the extent of his maintenance and cure and for his wages to the end of the voyage; (2) that the vessel and its owner are liable to indemnify a seaman for injuries received as a consequence of the unseaworthiness of the ship; (3) that all crew members except the master are fellow servants, and injuries sustained through the negligence of a fellow servant are not compensable beyond the allowance for maintenance and cure; and (4) that injuries occasioned by accident or the negligence of the master or any crew member are not compensable beyond the allowance for maintenance and cure. The *Osceola* case was a negligence action, the decision holding that a vessel would not incur liability in rem predicated upon the negligence of its master; hence, propositions (1), (3), and (4) were germane to the issue at hand. Notwithstanding its questionable origin, however, the "second proposition" was destined to take its place among the legal classics.

10. 87 F.2d 708 (2d Cir. 1937).

11. The alleged unseaworthiness was based on a defective ship's doorknob, and the jury had found that the defect "was hidden and latent and not discoverable by ordinary inspection by competent inspectors." *Id.* at 710.

12. In further justification of his decision, Judge Hand noted that shipowners are in a position to insure against similar mishaps, thereby treating such liability as a business expense. *Id.* at 711.

Any lingering doubts regarding the vitality of this proposition were finally dispelled by Mahnich v. Southern Steamship Co., 321 U.S. 96 (1943), a case involving negligently-caused unseaworthiness, wherein the Court voiced approval of *The Scandrett*:

> The Osceola . . . laid down . . . the rule of the *owner's unqualified obligation* to furnish seaworthy appliances . . . . It nowhere intimated that the owner is relieved from liability for providing an unseaworthy appliance, merely because the unseaworthiness was attributable to the negligence of fellow servants of the injured seaman rather than to the negligence of the owner. *Supra* at 101. (Emphasis added.)

[judicial] legislation."[13] However, it is generally conceded that the doctrine is warranted by the perilous circumstances and accommodations foisted upon a sailor, who has no choice but to stay with his ship, seaworthy or unworthy, when underway at sea.

A definition which might be extracted from the variety of conditions which have been held to constitute unseaworthiness is elusive at best, but it seems clear that an "appurtenance" of the vessel, rendered defective, is requisite. Obviously, injuries caused by defective appliances and equipment of the vessel[14] fall within the confines of the doctrine. Likewise, a crew member known to have pugnacious proclivities[15] may render his ship unseaworthy. Equipment brought on board by longshoremen[16] will satisfy the test. Furthermore, appliances in themselves entirely fit, if operated in a negligent manner, may provide instances (or instants) of "transitory unseaworthiness."[17] However, equipment or cargo which has not yet become "appurtenant," such as a crate being lowered into a ship's hold, has been held to be outside the scope of the remedy[18]—but the moment the object is settled on deck it may satisfy the standard.[19]

A line of cases involving ships in "moth-balls," or undergoing major structural repairs, establishes that workmen whose job it is to render a ship seaworthy can hardly be heard to complain of a defect which contributes to the very unseaworthiness they were employed to correct.[20] In these cases

13. Tetreault, *Seamen, Seaworthiness, and The Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 401 (1954).

14. The H. A. Scandrett, *supra* note 10 (doorknob); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (wet ladder); Mahnich v. Southern Steamship Co., *supra* note 12 (rope supplied by mate); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960) (wrench).

15. Boudoin v. Lykes Brothers Steamship Co., Inc., 348 U.S. 336 (1955) (assault by crew member); The Rolph, 299 Fed. 52 (C.C. Cal. 1924) (beatings at hands of mate).

16. DeVan v. Pa. R.R. Co., 167 F. Supp. 336 (E.D. Pa. 1956) (cargo hook); Considine v. Black Diamond Steamship Corp., 163 F. Supp. 107 (D. Mass. 1958) (chisel-truck).

17. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959) (overloaded winch); DiSalvo v. Cunard Steamship Co., 171 F. Supp. 813 (S.D.N.Y. 1959) (poorly rigged baggage chute); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) (slime on rail).

18. Carabellese v. Naviera Aznar, S.A., 285 F.2d 355 (2d Cir. 1960), *cert. denied*, 365 U.S. 872 (1961).

19. Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297 (2d Cir. 1958), *cert. denied*, 358 U.S. 908 (1958).

20. West v. United States, 361 U.S. 118 (1959); Noel v. Isbrandtsen Company, 287 F.2d 783 (4th Cir. 1961), *cert. denied*, 366 U.S. 975 (1961); Latus v. United States, 277 F.2d 264 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960). In West v. United States, *supra* at 122, the Court concluded:

> It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in [a case involving reactivation of a ship in the "moth-ball fleet"]. It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.

the courts have concluded that the status of a deactivated vessel does not comport with a warranty of seaworthiness to any person, thereby obviating the necessity of determining whether or not the nature of the injured person's employment justifies an award based on unseaworthiness. This reasoning is strictly limited to ships incapable of going to sea, for in all other instances the type of work being performed by the libellant should be controlling—this is in consonance with the apparent purpose of the doctrine, that is, the protection of all those subject to the vicissitudes of the life at sea.[21]

It is clear in the *Pichirilo* case that the equipment in question (boom and shackle) was clearly "appurtenant" and that the status of the *Carib* was such that she did warrant her seaworthiness. Furthermore, it has been well settled since the case of *Seas Shipping Co. v. Sieracki*[22] that the absolute duty to provide and maintain seaworthy appliances is owed to stevedores and longshoremen performing loading and unloading operations. Sieracki was a stevedore employed by an independent contractor; hence, no actual privity or warranty from the shipowner existed. Although the doctrine of unseaworthiness had been declared not incompatible with negligence, nevertheless it was thought to be essentially non-delictual. This thesis was expounded by the respondent in *Sieracki*,[23] and his argument was strengthened by allusion to the accepted term, "warranty of seaworthiness," which seemed to imply a contractual duty with an attendant privity requirement. The Court, however, had little difficulty disposing of this argument: "It is essentially a species of liability without fault . . . neither limited by conceptions of negligence nor contractual in character . . . a form of absolute duty owing to all within the range of its humanitarian policy."[24] The Court further indicated that anyone "performing the ship's service with the owner's consent"[25] was within this broad range. The case thus marked the incorporation of longshoremen "performing the ship's work"[26] into the realm of the duty owed previously only to seamen.

The question of in personam liability in the *Pichirilo* case turns on the issue of the demise charter, because of the determination that the ship-

21. It is submitted that in borderline cases, such as ships undergoing "minor structural repairs" or shipyard availabilities, any doubts should be resolved in favor of "activation," leaving the warranty question to turn on nature of employment.

22. 328 U.S. 85 (1945).

23. *Id.* at 90-93.

24. *Id.* at 94, 95.

25. *Id.* at 97.

26. Although *Sieracki* has been criticized on the grounds that, as an historical fact, the unloading of vessels has never been performed by seamen (Tetreault, *supra* note 13, at 413, 414), this academic inconsistency may perhaps be reconciled by viewing the loading and unloading processes as sufficiently integral in a ship's cycle of operation to be considered "ship's service"—in any event, the proposition of duty owed to stevedores by vessel owners is so well established that it will no longer admit of argument.

owner's duty to maintain his vessel's seaworthiness ceases when he delivers the ship to the demisee. This issue involves a balancing of the non-delegable character of the duty owed against the demise arrangement whereby the respondent owner-demisor relinquishes all control of the vessel to the demisee. Militating against the owner's liability in this situation is a respected corollary to a demise, that the demisee becomes owner *pro hac vice* (herein ostensibly for the purpose of incurring liability for unseaworthiness).[27] There is no question that the demisee stands in the owner's shoes in situations involving collision and negligence.[28] Furthermore, several decisions have held that the putative "ownership" of the demisee bars an action based on unseaworthiness arising after the demise against the actual owner,[29] the reasoning being substantially as follows: notwithstanding the non-delegable aspect of the duty, some privity should exist to justify foisting liability upon the owner—why should he incur liability for a condition over which he has no control?

This reasoning was dispositive of the case of *Canella v. Lykes Bros. S. S. Co.*,[30] wherein the court denied recovery in personam against the owner, indicating however that the controlling factor was that the defect had obtained after the demise. Otherwise (had the defect existed at the time the owner turned over the vessel to the demisee) the liability of the owner in personam would follow because, at some previous time, he had been in a position to correct it. Similar holdings have occurred in *Vitozi v. Balboa Shipping Co.*[31] and *Lopez v. American-Hawaiian Steamship Co.*,[32] both of which cases concerned only the question of liability in an action in personam against the owner out of control.[33] The decision in *Pichirilo* cites these

27. See Leary v. United States, 81 U.S. (14 Wall.) 607 (1871); GILMORE AND BLACK, *op. cit. supra* note 2, at 218.

28. Thorp v. Hammond, 79 U.S. (12 Wall.) 408 (1870); The Barnstable, 181 U.S. 464, 468 (1901) (dictum); Santiago v. United States, 102 F. Supp. 425 (S.D. N.Y. 1952).

29. Lopez v. American-Hawaiian Steamship Co., 201 F.2d 418 (3d Cir. 1953), *cert. denied*, 345 U.S. 976 (1953); Cannella v. Lykes Bros. S.S. Co., 174 F.2d 794 (2d Cir. 1949), *cert. denied*, 338 U.S. 859 (1949); Vitozi v. Balboa Shipping Co., 163 F.2d 286 (1st Cir. 1947). The opinion in the latter case asserted that the demise prevented any action based on unseaworthiness against the general owner, irrespective of when the defect developed, but in Pichirilo, *supra* note 1, at 813, 814, Judge Aldrich notes:

> Possibly we erred in extending this rule [in the Vitozi case, *supra*] indiscriminately to cases where the unseaworthy condition preceded the demise. . . . But we see no reason to reconsider when, as here, the defective condition arose only after the owner had parted with all possession.

30. *Supra* note 29, at 795.

31. *Supra* note 29.

32. *Ibid.*

33. Both Vitozi and Lopez were longshoremen employed by demise charterers. Both decisions invoked the ownership of the demisee *pro hac vice* to defeat recovery in personam against the general owner for injuries caused by the unseaworthiness of the respective vessels.

cases with approval, and then concludes that in the absence of any personal liability (of the owner-demisor because of lack of control and of the demisee because of the workmen's compensation statute), in rem liability would be unrealistic because it could only be predicated upon an archaic notion of the "personification" of a ship which gives rise to independent liability. In this vein, the court stated:

> The concept of a ship as an individual may have an aura of romance befitting the lore of the sea, but to regard it as an entity having separate responsibilities independent of the primary legal responsibility of some human actor has little rational appeal. This is not to say that the "personification" of the vessel is not a convenient shorthand method of expressing legal results.[34]

But is control, or the ability to correct, the *sine qua non* of the in personam action? Could liability in rem have no other basis than the "personification" theory?

Assuming that liability for unseaworthiness need not be predicated upon negligence,[35] the conclusion is inescapable that the denial of recovery in personam in *Pichirilo* was based on a presumed transfer, from owner to demisee, of the duty to furnish and maintain a seaworthy vessel. Yet this proposition may be questioned in the light of principles set forth in the *Sieracki* case[36] and the case of *Alaska Steamship Co. v. Petterson.*[37]

In *Sieracki*, notwithstanding that the shipowner maintained control of the vessel during the loading process and that the injury was caused by ship's gear, the Court did not avoid the practical issue of control. Well aware that the loading operations were under the exclusive direction of the independent stevedoring contractor, the Court noted that the obligation of seaworthiness "is peculiarly and exclusively the obligation of the [ship's] owner . . . . It is one he cannot delegate."[38] The Court further indicated that in personam liability without fault, under these circumstances, was justified by the hazardous nature of marine service and the inability of seamen and longshoremen to protect themselves against the perils inherent therein, and accordingly concluded:

> Those risks are avoidable by the owner to the extent that they may result from negligence. *And beyond this* he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost. (Emphasis added.)[39]

---

34. Pichirilo v. Guzman, *supra* note 1, at 814.

35. Mahnich v. Southern Steamship Co., *supra* note 12; Sieracki v. Seas Shipping Co., *supra* note 22.

36. *Supra* note 22.

37. 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam*, 347 U.S. 396 (1954).

38. *Supra* note 22, at 100.

39. *Id.* at 94.

The facts of the *Petterson*[40] case more nearly approach *Pichirilo* in that, in the former, the vessel owner had released control to the injured stevedore's employer, albeit of only a part of the ship and only for a very limited time. However, the injury to Petterson did occur within that limited time, on that part of the vessel released, and as a result of defective equipment brought on board by the stevedoring contractor.[41] The Court of Appeals for the Ninth Circuit had rejected the argument that the shipowner was exempt from liability for unseaworthiness arising after surrender of control of the ship to the stevedores, reasoning that that theory could only be based on negligence, and that *Sieracki* unequivocally released the unseaworthiness action from its shackles of culpability. The court also indicated that it was impelled to its conclusion by "the reference in the *Sieracki* opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from shipowners. . . ."[42] The court granted recovery in personam against the owner, and the Supreme Court affirmed per curiam.[43] In so holding, it relied solely on *Sieracki* and *Pope and Talbot, Inc. v. Hawn*,[44] a similar case wherein a carpenter, employed by an independent contractor, had been allowed to recover against the shipowner in an action based on negligence and unseaworthiness, the latter consisting of an uncovered hatch hole through which the libellant had accidentally fallen.

Bearing in mind the fundamental dissimilarity between *Petterson* and *Pichirilo* (*i.e.*, the existence of a demise charter in the latter), it may be questioned whether absolute liability in personam of the shipowner in the *Petterson* case is any less harsh than similar liability would be in *Pichirilo*, and if not, whether the magic appellation "owner *pro hac vice*" should be allowed to dictate such an inconsistency. In the *Vitozi, Cannella,* and *Lopez* cases,[45] Judge Aldrich found good authority for denying recovery in personam against the demisor; however, this rule seems to run counter to the "common core of policy."[46] It has been suggested that "the emphasis [in the area of unseaworthiness] has shifted from situs to status, from geography to policy."[47] Viewing the unseaworthiness action in perspective, from *The*

40. *Supra* note 37.

41. *Id.* at 479. It was not clear whether the offending equipment, which was a block, belonged to the ship or to the stevedoring contractor, but for purposes of the appeal, it was assumed to belong to the latter.

42. *Id.* at 480.

43. *Supra* note 37.

44. 346 U.S. 406 (1953). Justice Jackson's dissenting opinion, *Id.* at 419, contains an excellent account of the extreme privations encountered by seamen, which are responsible for their favored position as "wards of the admiralty."

45. *Supra* note 29.

46. Alaska Steamship Co. v. Petterson, *supra* note 37, at 480.

47. DiSalvo v. Cunard Steamship Co., *supra* note 17, at 819.

Osceola to date, it becomes apparent that a distinct philosophy has steadily developed, in consonance perhaps with an increased awareness of the unavoidable dangers encountered so frequently by all those performing the maritime service, and reflected in the great volume of personal injury litigation in this area. If the shipping industry is unable to eliminate these hazards, perhaps it may be expected to bear the costs of their results. As between Guzman and Pichirilo, little question is presented as to the better loss distributor.

Turning to the issue of liability of the *Carib* in rem, it must be borne in mind that Judge Aldrich considered the presence of personal liability a condition precedent to recovery in rem, and accordingly found for the respondent. In so holding he has leveled a challenge at the very essence of the maritime in rem proceeding,[48] at least insofar as it has been conceived in relation to the doctrine of unseaworthiness. The iconoclasticism of this challenge is enlightened by the dubious support accorded his decision by his best authorities. In *Burns Bros. v. The Central R.R. of New Jersey*,[49] a case involving collision, the Court of Appeals for the Second Circuit affirmed a finding of liability in rem even though the owner of the offending vessel had been personally exculpated in a prior adjudication.[50] In *Noel v. Isbrandtsen Company*,[51] the libellant's theory in rem was predicated on personal injury *apart* from any warranty of seaworthiness, and was summarily rejected by the court. Implicit in the language of the decision, however, is an assumption that personal liability would not be a condition of liability in rem in an action for unseaworthiness.[52]

Why then should liability in personam not constitute a condition precedent to a successful unseaworthiness action in rem? Why has this proposition remained unquestioned since its inception, when only a reliance or "personification" could sustain it? Is its sustenance still rooted in fiction? Or have other considerations dictated its retention?

It is noteworthy that Judge Learned Hand, in *Grillea v. United States*,[53]

48. See note 4 *supra*.

49. 202 F.2d 910 (2d Cir. 1953).

50. Burns Bros. v. Long Island R. Co., 176 F.2d 406 (2d Cir. 1949). The barge owner, Central R.R. of New Jersey, was exonerated because the collision had been chargeable solely to the negligence of the bailee and possessor of the barge, the Long Island R. Co., which was adjudged personally liable. The subsequent proceeding in rem (*supra* note 49), however, was necessitated by Burns Bros.' inability to satisfy its judgment against the Long Island R. Co., which had gone into reorganization.

51. *Supra* note 20.

52. Commenting on libellant's novel theory of liability in rem, the court noted:

> It is one thing to hold that a conviction or liability in personam is not a condition precedent to the action in rem; it would be quite another to say that the vessel may be held accountable as an entity *when there has been no violation of the warranty of seaworthiness*. . . . (Emphasis added.)

Noel v. Isbrandtsen Company, *supra* note 20, at 786.

53. 232 F.2d 919 (2d Cir. 1956). The action was brought by a longshoreman for

a case involving a demise charter, was likewise confronted by the thorny question of independent liability in rem in an action based on unseaworthiness. Relying on policy considerations, including the vessel owner's ability to distribute the loss, as set forth in *Sieracki* and *Petterson*, Judge Hand imposed liability, likening the in rem recovery to "a kind of 'Workmen's Compensation Act'; though limited by the value of the ship . . . ."[54] Nowhere in this opinion is there any mention of the "personification" of the ship. Judge Aldrich, in the *Pichirilo* decision, points out:

> [I]t is true that in *Grillea v. United States* . . . the court reached the opposite result. It did so without discussion, and with only the simple statement, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam' " . . . . With all deference we think so novel a principle needs more support than a statement that the court sees no reason against it.[55]

But was not Judge Hand merely acknowledging what he considered settled law, and suggesting a policy as the real motivation for his rejection of the proposed qualification to independent liability in rem? Should liability in rem require, or depend upon, personal liability which would itself be independent of fault? If an unseaworthiness action in personam were to necessitate a showing of negligence, then the inconsistency of a naked recovery in rem would be patent; since, however, the liability in personam is absolute, it would seem unrealistic to encumber the action in rem with such a requirement.[56]

In *Crumady v. The Joachim Hendrik Fisser*,[57] the Supreme Court cited *Grillea* for the proposition that a turnover of control of a ship to a stevedoring company during unloading operations does not include a delegation of

---

injuries sustained when he fell through a hatch. The hatch had been rendered unseaworthy by the libellant and his companion, who had placed thereon the wrong hatch cover. This condition had not existed when the respondent demised the vessel.

The libel was actually brought in personam against the United States because the Suits in Admiralty Act, 41 STAT. 525 (1920), 46 U.S.C. § 741 (1958) denies the right to a libel in rem against a vessel owned or chartered by the sovereign. However, the Suits in Admiralty Act, 41 STAT. 525, 526 (1920), 46 U.S.C. §§ 742, 743 (1958), grants a right in personam against the United States "wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained"; hence, the adjudication proceeded on principles applicable to a libel in rem against a vessel owned by a private person.

54. *Id.* at 923.

55. Pichirilo v. Guzman, 290 F.2d 812, 815 (1st Cir. 1961), *cert. granted*, — U.S. —, 82 Sup. Ct. 176 (1961) (No. 358).

56. Judge Hand observed in *Grillea* that, "[To say that a person's property should never be liable unless he or someone else is liable 'in personam'] would amount to saying that there should be no limited liability without fault, although unlimited liability without fault is not infrequently imposed." Grillea v. United States, *supra* note 53, at 924.

57. 358 U.S. 423 (1959).

the duty to maintain the vessel's seaworthiness.[58] The *Crumady* case was clearly distinguishable, however, from *Grillea* and *Pichirilo*, because it did not involve a demise charter and the libellant was not an employee of the negligent stevedoring contractor, whose liability, therefore, was not limited by the Longshoremen's and Harbor Workers' Compensation Act.[59]

The negligence of the stevedoring contractor in *Crumady* did permit of a third-party action whereby the respondent was allowed indemnity in a "recovery over" against the former, not however on a negligence theory but rather because of an implied indemnity provision in the contracting agreement.[60] In cases where such a written agreement between owner and independent contractor (who may also be a demisee) does exist, the courts have seized upon this contract to allow the vessel owner to recover over in a third-party suit based on breach of warranty (express or implied) of workmanlike service. This right-over allows ultimate liability to rest on the real offender but incidentally frustrates, by a circuity of action, the purpose of the Longshoremen's and Harbor Workers' Compensation Act.[61] In *Grillea* an express indemnity provision was alluded to by Judge Hand, but apparently not as a basis for his decision. While it might be contended that the existence of secondary liability was dispositive of the *Grillea* case, and that therefore *Pichirilo* (wherein no secondary liability existed, because the demise agreement was oral) stands apart even from *Grillea,* it should be noted that the third-party suit is always ancillary to primary liability. Since the issue of third-party liability can never arise until primary liability is fixed, any reasoning whereby the latter is made to depend upon the former seems unduly attenuated. Judge Aldrich noted that, "*Grillea* has resulted in some discussion of the effect of an indemnity clause in the demise . . . . We would agree . . . that the existence of an indemnity clause is beside the point."[62] Would not any other conclusion actually be a tacit admission that liability for unseaworthiness is not absolute and independent, but merely a convenient means of circumventing the limitations of the Longshoremen's Act?

58. *Id.* at 427.

59. 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1959). This statute, which provides compensation for injuries occurring upon the navigable waters of the United States, allows the stevedore to recover against his employer to the prescribed extent or to elect to proceed independently against third persons.

60. The actual provision of the agreement from which the indemnity was implied was "to faithfully furnish such stevedoring services." Crumady v. The Joachim Hendrik Fisser, *supra* note 57, at 428. See Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956); see generally, White, *A New Look at the Shipowner's Right-Over for Shipboard Injuries*, 12 STAN. L. REV. 717 (1960).

61. *Supra* note 59.

62. Pichirilo v. Guzman, *supra* note 55, at 815.

Two recent opinions, *Leotta v. The S.S. Esparta*[63] and *Reed v. The Yaka*,[64] both virtually indistinguishable from *Grillea*, have accepted the reasoning of the latter. In *The Esparta* the court recognized that the demisee was owner *pro hac vice* and that the defect had not existed when the ship was demised, but concluded that "[t]he shipowner is always there in the background."[65] In *The Yaka*, the court, commenting on the demisee's ownership *pro hac vice*, noted, "That is a term of art,"[66] and pointed out that the shipowner "does retain the right to the return of his ship at some future time."[67] These cases clearly do not rely on "personification," but rather seem to invoke the owner-demisor's reversion in the ship in justification of independent absolute liability in rem, which thesis seemingly bespeaks a reliance on policy considerations.

It seems possible, then, that the personification theory, like so many other legal fictions, has served as a make-weight, allowing the courts to achieve what they considered reasonable results with minimal ripples on the judicial calm. As the principle becomes established, the fiction, having served its purpose, becomes obscure and is supplanted by the compelling considerations which justified its initial utilization. If this be true, then it would seem that the identical policy consideration, that is, a solicitude for the lot of those performing shipboard work because of the inherently dangerous nature of this calling, underlies recoveries in rem and in personam for unseaworthiness. Perhaps the unseaworthiness doctrine should therefore be considered a primary head of maritime liability, with complementary incidents of in rem and in personam recovery, rather than a theory somewhat subservient to these procedural devices. The Supreme Court, in *Pichirilo*, would then be presented only with the question: shall a longshoreman be precluded from bringing an action based on the unseaworthiness of a ship demised to his employer?

ADDISON M. BOWMAN III

63. 188 F. Supp. 168 (S.D. N.Y. 1960).
64. 183 F. Supp. 69 (E.D. Pa. 1960).
65. *Supra* note 63, at 169.
66. *Supra* note 64, at 76.
67. *Ibid.*

MICHAEL v. HAHNEMANN MEDICAL COLLEGE AND HOSPITAL: CHARITABLE IMMUNITY AFFIRMED?

In the recent case of *Michael v. Hahnemann Medical College and Hospital*,[1] the Supreme Court of Pennsylvania upheld the immunity of charitable corporations from tort liability. The adjudication involved appeals of two lawsuits: one a death and survival action for negligent failure to give treatment which would prevent the contraction of tetanus; the other an action for the performance of an operation which materially differed from that prescribed by the staff physician, and as a result of which the plaintiff became permanently disabled. The appeals were taken from the respective trial courts after they granted motions for judgments on the pleadings on the ground that defendants were eleemosynary institutions and therefore not subject to tort liability. The Supreme Court of Pennsylvania affirmed.

The sharply divergent views which the several justices of the Supreme Court of Pennsylvania took regarding the doctrine of charitable immunity compel an analysis of the reasoning behind their respective positions in this matter.[2]

The doctrine of charitable immunity has been attacked and repudiated in many American jurisdictions.[3] In Pennsylvania, charitable corporations have enjoyed immunity from tort liability since 1888 when *Fire Insurance Patrol v. Boyd*[4] held that "A public charity, whether incorporated or not, is but a trustee and is bound to apply its funds in furtherance of the charity and not otherwise."[5] This so-called trust fund theory of charitable immunity originated in England by way of dictum in *Duncan v. Findlater*[6] and was later followed in *Feofee's of Heriot's Hospital v. Ross*,[7] where it was held that "To give damages out of a trust fund would not be to apply it to those

1. 404 Pa. 424, 172 A.2d 769 (1961).

2. Four of the seven justices who heard the *Hahnemann* appeal stated that they are in favor of abolishing charitable immunity. However, one of the four, Justice Bok, sided with the present majority even though he was in favor of abolishing the doctrine. Justice Bok believes that a repudiation of charitable immunity should operate prospectively rather than retroactively to protect those charities which have not taken out insurance but rely upon the doctrine of charitable immunity.

3. PROSSER, TORTS § 109 (2d ed. 1955). It is there stated that only 12 states have retained complete charitable immunity. Since then, Wisconsin has repudiated charitable immunity in the case of Kojis v. Doctor's Hospital, — Wis. —, 107 N.W.2d 131 (1961). Missouri adopted modified immunity in Blatt v. George H. Nettleton Home for Aged Women, note 28 *infra*. Idaho rejected charitable immunity in Wheat v. Idaho Falls Latter Day Saints Hospital, 78 Idaho 60, 297 P.2d 1041 (1956). Kentucky adopted modified immunity in Roland v. Catholic Archdiocese of Louisville, 301 S.W.2d 574 (Ky. 1957).

4. 120 Pa. 624, 15 Atl. 553 (1888).

5. *Id.* at 647, 648, 15 Atl. at 557.

6. 6 Cl. & Fin. 894, 7 Eng. Rep. 934 (1839).

7. 12 Cl. & Fin. 507, 8 Eng. Rep. 1508 (1846).

objects whom the author of the fund had in view, but would be to direct it to a completely different purpose."[8]

As it was on the basis of the trust fund theory that charitable immunity was originally adopted as the law of Pennsylvania, it is submitted that the trust fund theory is not a sound basis for the retention of the doctrine of charitable immunity, *Duncan v. Findlater* having been overruled by *Mersey Docks Trustees v. Gibbs*.[9] This latter case changed the law with respect to the immunity of trust funds and abolished charitable immunity in England before it was ever adopted by Pennsylvania.[10] If the trust fund theory, the basis of charitable immunity, is rejected, it would seem to follow that a repudiation of immunity is in order. However, its very existence gives rise to additional factors which make the question of affirmance or repudiation a difficult one to resolve. There must be careful consideration of the additional financial burdens which repudiation might place upon charitable corporations and a balancing of the importance of adherence to stare decisis to the right of redress which usually accrues to one injured through the fault of another.

The importance of adhering to stare decisis is stressed by Justice Bell, who states that, "The minority opinion would overrule without any legal justification decisions of this court covering a period of over 70 years, and would not only disregard, but would effectually obliterate the last vestiges of the wise, salutory and time-tested principle of Stare Decisis."[11] Justice Bell's respect for stare decisis and the important role it plays in an orderly and predictable legal system is an important factor. However, this would seem to be overemphasized in light of Justice Musmanno's forceful dissenting opinion that "Stare decisis is not an iron mold into which every legal principle must be poured where, like wet concrete, it acquires an unyielding rigidity which nothing later can change."[12]

Public policy considerations will necessarily come to bear on the ultimate

8. *Id.* at 513, 8 Eng. Rep. at 1510.

9. XI H.L.C. 686, 11 Eng. Rep. 1500 (1866).

10. The date of *Mersey Docks Trustees v. Gibbs* was 1866 while that of *Fire Insurance Patrol v. Boyd* was 1888.

When one considers other legal responsibilities with which charities are saddled it is even more difficult to accept the trust fund theory. An eminent authority on corporations contends that "no court can consistently adopt the trust fund theory and then hold the corporation to any liability whatsoever, in any case or to any plaintiff." FLETCHER, PRIVATE CORPORATIONS § 4928 (perm. ed. rev. repl. 1961). Based upon the foregoing, it is difficult, if not impossible, to answer Justice Musmanno's query of how can it be consistent for a charitable corporation to pay Workmen's Compensation while denying recovery in an ordinary negligence action for the same type of injury. Michael v. Hahnemann, *supra* note 1, at 462, 172 A.2d at 788.

11. *Id.* at 429, 172 A.2d at 772. Query whether or not there is "legal justification" for overruling charitable immunity.

12. *Id.* at 456, 172 A.2d at 785.

fate of charitable immunity. There are strong arguments in favor of the retention of the doctrine. It is unquestioned that nonprofit institutions such as rest homes, institutions of higher education, and charitable hospitals, perform an indispensable service to great numbers of people annually. Indirectly, at least, these institutions are of benefit to the general public. The problem is whether, in guaranteeing tort recovery to a few individuals, we would be risking an appreciable diminution in the amount of funds applied to charitable purposes. Justice Bell avers that charitable immunity is necessary, not only to protect the funds of eleemosynary institutions, but to insure a constant and undiminished flow of donations from the public.[13] He feels that public-minded benefactors will be deterred from contributing to charitable institutions if the donation might be diverted to answering tort claims.[14]

The policy arguments in favor of charitable tort liability are also meritorious.[15] The law of torts is intended to reimburse persons for the injuries they suffer as a result of the wrongful acts of others. To deny recovery on the basis of charitable immunity is equivalent to forcing the injured party to make a contribution to the charity in the amount of the loss which he has suffered. The amount involved in the tort claim may be small as compared to some charitable gifts. which have been made by certain philanthropists. Nevertheless, a person who foregoes his tort claim may suffer since he will be making a contribution which he can not afford.[16]

In addition to the primary purpose of the law of torts, *i.e.*, to make the injured party whole, the *Hahnemann* case alluded to the idea that one can expect more care to be exercised when the actor is aware that he has a financial responsibility for damage done by his negligent acts.[17] Further, it

13. *Id.* at 436, 172 A.2d at 775.

14. Bell believes that the drying up of contributions will necessitate government funds and in the case of hospitals could result in socialized medicine.

15. Justice Musmanno answers the argument made by Justice Bell, that to subject a charity to large tort claims would discourage contributors, by implementing a statement made by Justice Rutledge in the case of President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (U.S. App. D.C. 1942):

> No statistical evidence has been presented to show that the mortality or crippling of charities has been greater in states which impose full or partial liability than where complete or substantially full immunity is given. Nor is there evidence that deterrence of donation has been greater in the former. Charities seem to survive and increase in both with little apparent heed to whether they are liable for torts or difference in survival capacity.

Michael v. Hahnemann, *supra* note 1, at 468, 172 A.2d at 791.

16. The immunity of charitable corporations in tort is based upon very dubious grounds. It would seem that a sound social policy ought, in fact, to require such organizations to make just compensation for harm legally caused by their activities under the same circumstances as individuals, before they carry out their charitable activities. The policy of law requiring individuals to be just before generous seems equally applicable to charitable corporations.

HARPER, TORTS 657 § 294 (1933).

17. Michael v. Hahnemann, *supra* note 1, at 453, 172 A.2d at 784.

would seem that officials of charitable corporations would select more qualified employees and stress proper safety precautions if they were not immune from tort liability.

The argument that it is more important to protect the funds of a charity than to recognize the rights of an injured individual, because of the great benefits derived from charitable institutions, is very persuasive on its face. However, this rationale is based on the faulty assumption that it is impossible for charities to protect the bulk of their funds and at the same time discharge their tort obligations. A charity could obtain this protection and at the same time discharge its obligations simply by paying an annual insurance premium which would hardly be a serious burden.[18]

As a compromise between affirmance and complete repudiation of charitable immunity some jurisdictions have adopted modified immunity. Modified immunity grants immunity to charitable corporations in some situations, but imposes tort liability under other circumstances. The "waiver theory" is one that confines charitable immunity to those persons who stand in direct beneficial relation to the charity. This form of modified immunity combines a recognition of sound legal principles with respect for the purely charitable actions which Justice Musmanno argues are the exception rather than the rule today. Jurisdictions subscribing to the waiver theory, or as sometimes denoted, the "Stranger Theory," hold that charitable corporations should be liable for the torts of their servants, with the single exception that one who is reaping the benefits of the charity is not permitted to "bite the hand that feeds it" and recover damages from his benefactor. In accepting the benefits of the charity, one is said to "waive" all tort claims which may arise during the period in which he is so aided.[19]

Although there is perhaps much to be said in favor of the waiver theory, a basic objection is that it is not in fact a waiver at all. When one seeks aid from a charitable institution he would hardly consider whether or not the institution will be liable for its negligence in treating or otherwise benefiting him. Obviously, the waiver is given without the knowledge of the person who forfeits his claim. Even if a written waiver was entered into by the beneficiary, he would not be in a position to reject its terms.

18. Query whether many charitable corporations have not already procured insurance against possible future tort liability.

19. In the case of Haynes v. Presbyterian Hospital Association, 41 Iowa 1269, 45 N.W.2d 151 (1950), plaintiff was injured while a patient in defendant hospital. When plaintiff sued for damages, defendant raised as a defense that it was an eleemosynary institution and therefore immune from tort liability. The Supreme Court of Iowa held that defendant should not be permitted to avoid liability on the basis of charitable immunity. The court said that since plaintiff was a paying patient he did not stand in direct beneficial relation to the charity and therefore did not waive his right to tort recovery.

Another objection to the waiver theory is that the one forced to give up his tort claim may not be in a financial position to make such a "contribution" to the charity. In fact, it would seem that one who directly benefits from the charity can ill afford to waive compensation for loss of wages or other pecuniary damage resulting from an injury. Further, even though a plaintiff pays for the benefits received by him from the charity, he may be denied recovery in some jurisdictions on the grounds that he is indirectly benefited by the mere existence of the charity.

Some courts have permitted recovery against a charitable corporation if it is engaged in profitable activities. This is based on the profit theory whereby a charity must assume liability for such tortious conduct that arises out of profitable ventures which are unrelated to its charitable purpose. Here the similarity to business undertakings warrants analogous tort liability. This theory was followed in *Blatt v. George H. Nettleton Home for Aged Women*,[20] where the plaintiff sustained injuries due to the defendant's negligence concerning a building which it leased for profit. Although defendant was a charitable corporation the court held that it was not entitled to immunity since the building was a profit-making venture. The "profit theory" as employed in *Blatt* may be used to extend liability to a charity which receives payment from a plaintiff for performing its function. However, the objection here is that it is not legally sound to deny or to allow recovery simply on the basis of whether or not one is able to pay for the services rendered.

Despite the fact that modified immunity is in theory an appealing compromise, the basic considerations for or against charitable immunity seem to weaken the advantages of adopting any modified form of immunity. It is felt that the Pennsylvania Supreme Court has given weight to the proper issues which are decisive either in favor of retaining complete charitable immunity or for its rejection in toto.

In *Hahnemann* the court urged that any rejection of charitable immunity should be effected by the legislature and not by the courts. They felt that abandonment of the doctrine by a retroactive court decision "would lay open to liability all charities for their torts of the past that were not barred by the statute of limitations at the time of the rendition of the rescinding decision."[21] Their bases for this reasoning were that the prospective nature of a legislative act would enable charities which have been relying upon charitable immunity to insure against tort liability, and that the policy questions involved make it a legislative problem. Further, it was pointed out in the concurring opinion that the legislature has impliedly approved charitable immunity since it has

20. 365 Mo. 30, 275 S.W.2d 344 (1955).

21. 392 Pa. 75, 78, 140 A.2d 30, 32 (1958); Michael v. Hahnemann, *supra* note 1, at 434, 172 A.2d at 771.

studied the question but thus far has failed to act. Contrary to this position the dissenters felt that since charitable immunity was a judicially created doctrine, it was the responsibility of the courts to effect its abolition.[22]

The most convincing argument for repudiation by the legislature is the prospective nature of legislative acts. There is no question that hardship would result from a repudiation of charitable immunity by the court if the charities are not adequately insured. The dissenting opinions contend that charitable corporations are aware that the trend is against charitable immunity and presumably have taken adequate precautions. If this is true, then the insurance companies are reaping the benefits of charitable immunity by collecting premiums to protect institutions needing no such indemnity. The insurance companies would suffer no injustice if the eventuality against which they were insuring occurred.[23] But, if the assumptions of the dissenting justices in the *Hahnemann* case are incorrect, *and* if it is felt that the repudiation of charitable immunity is a matter for the court rather than the legislature, the recommendation of Justice Bok's concurring opinion demands careful consideration. He favors the prospective abolition of charitable immunity by the court,[24] but feels it should be retained for the present since many charities are relying on the immunity. If this is true, some charitable corporations might suffer serious financial setbacks if they are not informed that the Supreme Court of Pennsylvania no longer intends to uphold their tort immunity.

The constitutionality of prospective judicial decision has been upheld by the United States Supreme Court.[25] A law review article,[26] referred to

22. Justice Musmanno contends that since the constitution of Pennsylvania prohibits the legislature from "granting to any corporation, association, or individual any special or exclusive privileges or immunity," the courts had no power to grant such an immunity and that the legislature should not be required to pass a law abolishing something which is already unconstitutional. Both Justice Cohen and Justice Musmanno feel that the court has the burden of repudiating a doctrine of its own creation:

> The doctrine of charitable immunity was wrong when first enunciated and is wrong now. We should not perpetuate the wrong by relegating to the legislature our responsibility to correct our own mistake; nor should we hide behind our former decisions "made against common justice and the general reason of mankind.

Michael v. Hahnemann, *supra* note 1, at 474, 172 A.2d at 774.

23. Michael v. Hahnemann, *supra* note 1, at 471, 172 A.2d at 793.

24. *Id.* at 442, 172 A.2d at 778.

25. In the case of Great Northern Railway v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932), the Court, in upholding a state court decision that a reversal of a previous interpretation of a rate fixing statute would operate prospectively, said:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principal of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.

287 U.S. 358, 364.

26. Levy, *Realistic Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). The author also states that prospective judicial decision will become more

by Justice Bok in his concurring opinion, strongly follows the lead of Mr. Justice Cardozo in the *Sunburst* case, in advocating the adoption of prospective judicial decision. A prospective decision should only be made where prior law is being changed and where a party who relies on previous holdings would be seriously injured if reversal operated retroactively.[27] It is because of this apprehension of serious injury to those relying on charitable immunity that Justice Bok aligned himself with the majority in the *Hahnemann* case. Regardless of one's personal views on Justice Bok's interesting proposal of prospective judicial decision, his position places him in the middle of an otherwise equally divided court. Since Justice Bok favors the abolition of charitable immunity by the court only if it operates prospectively rather than retroactively, Pennsylvania is faced with a dilemma wherein a majority of the court favors repudiation but permits its continued existence because unable to agree on the method by which it should be repudiated. It is submitted that because of this unusual alignment the court should make every effort to find an acceptable method to accomplish this end. The greatest injustice would be done by retaining a law which a majority of the court feels no longer serves the best interests of the public.

LEE A. LEVINE

---

prevalent when appellate courts admit that they are making law rather than merely "discovering" it as it always existed. *Id.* at 24. There are, however, several arguments against the use of prospective judicial decision. *Id.* at 17. The first is that this would be outright legislation by the courts. Another is that prospective decisions would discourage appeals by those parties who fear that even were the court to reverse itself they will not receive the benefit thereof. A third is that a prospective reversal must of necessity be mere dictum and, therefore, the state of the law will remain uncertain. A fourth criticism of prospective judicial decision is that appellate courts will be encouraged to reverse previous decisions, thereby diminishing the importance of stare decisis and reliance on prior case law.

27. *Id.* at 12.

IN RE NEGLIA'S ESTATE: VALIDITY OF TRANSFER BY GIFT OF UNITED STATES SAVINGS BONDS IN CO-OWNERSHIP FORM

In the recent case of *In re Neglia's Estate*,[1] the decedent had attempted an inter vivos gift of a United States savings bond to her husband by endorsing the bonds, stating her intent to make a gift of the bonds, and manually delivering them to her husband who retained possession thereof until decedent's death. Because the transfer was not made to conform to standard federal regulatory procedures,[2] the Orphans' Court of Cambria County held that the decedent's brother, the person designated on the bonds as co-owner with the decedent, was the owner. This decision was based on the principle that federal regulations have the force and effect of law. On appeal to the Supreme Court of Pennsylvania this decree was reversed. The legal issue involved in this Case Note is whether a United States savings bond, issued pursuant to the federal regulations,[3] which prohibit their transfer in any other form than that specified, can be the subject of a gift either inter vivos or causa mortis without conforming to standard regulatory procedures.

The Supreme Court of Pennsylvania held that federal regulations do not control the *eventual disposition of the proceeds.* By reason of the contract of purchase, upon death of one co-owner, payment must be made to the designated co-owner. However, these regulations do not apply to the individual rights of persons who, under the state law of property, have become equitably entitled to the proceeds. It is submitted that these regulations determine the rights of the holder of the bond as against the Government; but, they do not determine the rights of individual citizens against each other arising out of transactions concerning the bonds. It does not necessarily follow that just because the regulations of the United States Treasury Department on the transfer of the bonds were not complied with, the attempted gift to the husband should be void.

---

1. 403 Pa. 464, 170 A.2d 357 (1961).
2. The pertinent regulations are as follows:

   31 C.F.R. § 315.15 (1959). *Limitation on transfer or pledge.* Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in the regulations. . . .

   * * *

   31 C.F.R. § 315.60(a) (1959). *Payment—During the lives of both co-owners.* The bond will be paid to either upon his separate request, and upon payment to him the other shall cease to have any interest in the bond. . . .

   * * *

   31 C.F.R. § 315.60(b) (1959). *Reissue—During the lives of both co-owners.* The bond may be reissued upon the request of both if presented and surrendered during the lifetime of both. . . . Form PD 1938 should be used to request reissue. . . .
3. 31 C.F.R. § 315.0-.94 (1959).

It appears that the purpose of the federal regulations in preventing transfers is two-fold: (1) to encourage thrift and savings by small investors by accumulating interest until the date of maturity (since the interest due upon the bonds is not currently paid, but accumulates until the date of maturity)[4] and (2) to prevent the Government from becoming involved in suits between claimants of Government bonds.[5] These considerations seem to permeate most of the decisions in point. Because of the secure and reliable debt which the bond evidences, it is also felt that perhaps an easily transferable entity would be used as a substitute for currency in commercial transactions.

With respect to rights in United States savings bonds registered in the names of two individuals in the alternative, the majority rule is that the surviving co-owner is vested with the sole ownership of the bonds.[6] The only exception made to this rule is where the surviving co-owner is adjudged guilty of fraud or other inequitable conduct.[7]

The majority of the jurisdictions, holding that federal regulations are controlling, appear to look to the following rules: (1) savings bonds are not transferable and are payable only to the owners named thereon,[8] (2) the survivor will be recognized as the sole and absolute owner if either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue,[9] and (3) no judicial proceedings will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond.[10]

Apart from the regulations, the majority rule utilizes other theories to prevent a transfer of the bonds. It can certainly be argued that since

4. Moore's Adm'r v. Marshall, 302 Ky. 729, 196 S.W.2d 369 (1946).

5. Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958).

6. Re Prifer, 53 Pa. D.&C. 103, 7 Mon. Leg. R. 19, 10 Schuy. Reg. 170 (1945); Moore's Admr' v. Marshall, *supra* note 4; Fidelity Union Trust Co. v. Tezyk, 140 N.J. Eq. 474, 55 A.2d 26 (1947); Thomas v. McGroarty, 69 Pa. D.&C. 108, 40 Luzerne Leg. Reg. 335 (1948); Connell v. Bauer, 240 Minn. 280, 61 N.W.2d 177 (1953); Horstman Estate, 398 Pa. 506, 159 A.2d 514 (1960). The basis for this weight of authority seems to be that a gift by delivery only with appropriate words indicating an intention to give, but without registration in the name of the donee, is not effective since it is in violation of the regulations and provisions under which these bonds were issued. To hold otherwise would be to ignore the regulations which are a part of the law under which they were issued, and would hinder the accomplishment of the purposes intended by those regulations and lead to confusion as to the disposition of the great amount of these bonds in every state.

7. Katz, Adm'x v. Lockman, 356 Pa. 196, 51 A.2d 619 (1947). This was an action by administratrix to have the transfer of bonds set aside on the ground that defendant, by fraud and undue influence induced the deceased father to place bonds in joint names. Evidence sustained a decree directing the defendant to transfer bonds to administratrix.

8. 31. C.F.R. § 315.15 (1959).

9. 31. C.F.R. § 315.61 (1959).

10. 31. C.F.R. § 315.20 (1959).

the United States Government may elect not to respect the transaction of an attempted gift (without transfer by registration), the intended donee will not be enabled to collect the debt evidenced by the bond. Thus complete dominion and control of the bond has not really been vested in the donee as required by state rules governing gifts inter vivos. It becomes uncertain as to who owns what with reference to the debt evidenced by the bond.[11] Thus, the donor has not done everything possible to give the donee complete dominion until the bonds are reissued in the name of the donee, as required by the regulations. In the absence of such compliance, the transfer would be a mere transfer of possession and custody without the requisite relinquishment of ownership. Although this scheme of thought is theoretically sound, practically speaking, it leaves much to be desired. For, if the intent of the donor to make a gift is correctly manifested, justice can follow only by giving recognition to his desire. When the donor has performed all other reasonable acts to manifest his intent to relinquish ownership, it should make little difference that a donee has not as yet obtained complete ownership in terms of the regulations.

The bond is actually a contract between the United States Government and the registered owner. Consequently, the majority holds that federal law must govern the transfer and the rights of the parties thereto.[12] These courts seem to reject any distinction between the right to collect from the Federal Government and the respective rights of the alleged donor-donee. This theory is based on the ground that a donor would not intend to make a gift which the donee could not utilize and enjoy. It is felt that all courts should give effect to the regulations under which the bonds were issued since they represent the policy of the federal government and are an essential part of the contract.[13] For under the regulations the purchaser of a United States savings bond may still donate the value of a bond to another as a gift by having the bond issued and registered, or reissued, in the name of the prospective donee as sole owner, as co-owner,[14] or as beneficiary.[15] Finally, it was the apparent pressure of state policy which brought the court in *Moore's Admr' v. Marshall*[16] to conclude:

> A holding that these United States savings bonds are trans-

11. Brown v. Vinson, 188 Tenn. 120, 216 S.W.2d 748 (1949).

12. Connell v. Bauer, *supra* note 6; Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (1948), *aff'd*, 274 App. Div. 1036, 85 N.Y.S.2d 917 (1949); Re Prifer, *supra* note 6; Horstman Estate, *supra* note 6.

13. The majority rule further bases its contentions on the fact that federal law, as represented by the Treasury Regulations, is supreme and state law or policy in conflict therewith must give way. In Re Evans' Estate, 57 Pa. D.&C. 55 (1947).

14. Dempsey v. First Nat. Bank, 353 Pa. 473, 46 A.2d 160, *affirming* 46 Lack. Jur. 121 (1945).

15. Re Laundree, 277 App. Div. 994, 100 N.Y.S.2d 145 (1950).

16. Moore's Admr' v. Marshall, *supra* note 4.

> ferable by gift inter vivos would defeat the purpose of the Act of Congress[17] and the Treasury Regulations, and would open the door for evasion of plainly expressed restrictions on transfer. Each of these bonds, together with the Act and Treasury Regulations, constitute a valid and binding contract determining the rights of the parties therein, and the *regulations have the force and effect of law*[18] and are to be read into the contract between the purchaser of the bonds and the United States Government.[19] (Emphasis and footnotes added.)

However, this presents a question as to the extent a regulation may control the basic property law concerning gifts in the several states. For there appears to be no justifiable basis for preventing a state court from declaring a gift valid when the requisite elements of a gift have been performed. To reason otherwise would be to change the property laws of a state. *This* is certainly not the intent of the federal regulations.

On the other hand, a few jurisdictions form the nucleus for the minority rule. These courts take the position that the regulations have no binding force or effect concerning the transfer of the bonds. It is felt that the contract between the United States Government and the purchaser fixes legal title to the bonds for the purpose of protecting the Government against suits involving title. However, the federal regulations do not and should not affect other legal rights of third parties or change settled rules of law not necessary to effectuate its purpose.[20] Such courts point out that they are not passing upon the issue of whether or not the provision prohibiting judicial proceedings[21] might not become material in a controversy between the donee and the Government or the fact that the donee might experience some difficulty in having the bonds cashed. There is justification for this since it is in the best interests of the public to prevent a multitude of unnecessary litigation. However, these courts do hold that whatever the outcome of the controversy between the donee and the Government when such a bond is presented to the Treasury Department for payment or reissue, nevertheless, as between the executor of the decedent's estate and the donee, the latter is entitled to

---

17. 49 STAT. 20 (1935), as amended; 31 U.S.C. § 757c (1959).

18. The enabling statute authorizing United States savings bonds makes no mention of the fact that the prescribed regulations should be given the "force and effect of law."

19. Apparently, the fact that the bonds were purchased solely with the funds of the decedent in *In Re Neglia* made little difference to the lower court, for this was not to affect the rights of the surviving co-owner to sole and absolute ownership.

20. Silverman v. McGinnes, *supra* note 5 (valid gift of United States savings bonds to former wife and children without a reissuance); Re Borchardt's Estate, 179 Misc. 456, 38 N.Y.S.2d 987 (1942).

21. 31 C.F.R. § 315.20 (1959). Such provision prohibits giving effect to a voluntary transfer inter vivos of such bonds.

the bond by virtue of the gift.[22] It appears that these are the better reasoned decisions in that the regulations merely provide a convenient method of payment by which to discharge the Government's obligations. There appears to be no authority that it was the intention of Congress to create a non-alienable chose in action; but, rather to provide a guide by which transfers of the bonds might be facilitated.[23]

There are cases in Pennsylvania wherein the courts, without specific reference to Treasury Regulations, or to the question whether such bonds may be the subject of a gift, have held, upon the particular circumstances, that there were valid gifts causa mortis. In *Re Elliott's Estate,*[24] although the transfer of a United States savings bond was in issue, the court concerned itself solely with the problems of manifested intent and constructive delivery. In *Re Borchardt's Estate,*[25] a New York trial court took the minority view in holding that the regulations did not explicitly or impliedly prohibit a gift causa mortis of such bonds. In rejecting *Re Borchardt's Estate,* a New Jersey court,[26] in taking the majority view, had suggested that in order to hold a gift causa mortis of such bonds valid, such an exception to the regulations should be made by the federal government. In seeming response to this, the Treasury Department subsequently issued a regulation providing that a gift causa mortis of sole-ownership bonds would be recognized.[27]

In regard to gifts inter vivos, the minority view is that all personal property, when legal and equitable title can pass by actual or constructive delivery, may be the subject of a valid gift.[28] Thus, a gift of a chose in action may be made by manual delivery of the instruments even though the subject of the gift is securities which are non-negotiable or even non-transferable *by their own terms.*[29]

---

22. Re Vanicek's Estate, 145 Neb. 531, 17 N.W.2d 477 (1945); Blair v. Kirchner, 319 Ill. App. 348, 49 N.E.2d 292 (1943); Marshall v. Felker, 156 Fla. 476, 23 So.2d 555 (1945) (all of which involved United States postal saving certificates which were issued under similar governmental prohibitions against transfer).

23. As in the case of many regulations, they are to be given the connotation that they merely suggest or provide direction, rather than mandatorily decree.

24. 312 Pa. 493, 167 Atl. 289 (1933); see also Re Yeager's Estate, 273 Pa. 359, 117 Atl. 67 (1922).

25. Re Borchardt's Estate, *supra* note 20.

26. Fidelity Union Trust Co. v. Tezyk, *supra* note 6.

27. 31 C.F.R. § 315.22 (1959).

28. It was ruled in Re Rigard's Estate, 32 Erie Co. L.J. 219 (1948), at 220, that "the conditions surrounding the transaction will be invoked to interpret the intention of the donor and the donee, and if they are competent to give and competent to receive, and there is delivery and a transfer of possession, if will be regarded by law as an executed contract."

29. In Re Estate of Diskin, 105 Pa. Super. 519, 161 Atl. 893 (1932); Janusiki's Estate, 2 Fiduciary 505, 68 Montg. 343, 16 Som. 160, 66 York 137 (1952) (Government bonds and postal certificates).

In *Horstman Estate*,[30] one of the more recent and leading cases on the subject in Pennsylvania, the supreme court determined that between the Government and the co-owner designated on the bond, by reason of the contract of purchase, payment must be made to the designated co-owner. However, it is felt that *Re Neglia* must be distinguished from *Horstman Estate* in four respects.

In *Re Neglia* there was (1) a delivery, (2) an endorsement of the bonds, (3) a payment by the United States Government of three of the sixteen bonds in issue, and (4) a recognition by the brother (co-owner) of a valid gift although he subsequently refused voluntarily to make the transfer. It is submitted that if the facts in *Horstman Estate* would have given rise to a valid gift under the property laws of the state, then the supreme court at that time might have determined that the federal regulations would not control the eventual disposition of the proceeds of the bonds.

It is significant to note that the only cases discovered which support the minority view concern bonds of the sole-ownership variety. None concern a gift inter vivos of a bond which was held valid where the rights of the co-owners were thereby defeated. Furthermore, it appears that the regulation permitting a gift causa mortis[31] still prohibits such a gift if the bonds are in co-ownership form. Thus, it may well be that *Re Neglia* has dealt a harsh blow to the majority rule by means of a hair line interpretation of the regulations. Perhaps the court remained cognizant of the fact that the bonds are taken out in co-ownership form for the purpose of taxation in some cases and that the usual procedure when buying bonds is not to read the fine print concerning their transfer. This would appear to be valid justification for the better-reasoned minority view. Just as the regulations took a more liberal view concerning a gift causa mortis of sole-ownership United States savings bonds (which is certainly a great step forward since the requirements for such a gift are so much more stringent than those of a gift inter vivos) so, too, may the regulations someday permit other transfers by gift in order to alleviate the chaos in which the courts find themselves.

SHELDON A. WEINSTEIN

30. Horstman Estate, *supra* note 6.
31. 31 C.F.R. § 315.22 (1959).

BATTALIA v. STATE OF NEW YORK: ABOLITION OF THE IMPACT RULE IN NEGLIGENTLY CAUSED FRIGHT CASES

In a recent case, *Battalia v. State of New York*,[1] the New York Court of Appeals repudiated the impact rule in negligently caused fright cases. The case arose for injuries received when a nine-year-old girl was placed in a ski chair lift by an attendant of the state, and the attendant failed to secure and properly lock the safety belt. Upon the descent of the chair, the infant plaintiff became frightened, hysterical, and suffered emotional disturbances with consequential physical injuries. The New York Court of Claims[2] ruled the complaint stated a cause of action. The appellate division reversed[3] holding that under *Mitchell v. Rochester R.R.*[4] there could be no recovery for injuries, physical or mental, induced by negligence in the absence of some immediate physical injury. The court of appeals[5] reversed the appellate division, affirmed the court of claims, overruled the *Mitchell* case,[6] and discarded the requirement of impact or immediate physical injury in cases where fright is caused by negligence.

The purpose of this Case Note is threefold: to find justification for abolition of the impact requirement; to show that the reasoning of the *Mitchell* court was not erased in one fell swoop, but rather was gradually eroded away by the New York courts over the last thirty-five years; and to compare the present state of the law in New York with that of Pennsylvania.

Justification for the *Battalia* decision can best be shown by examining the reasoning of the court in the *Mitchell* case.[7] In that case, plaintiff was waiting on the corner for one of defendant's horse cars. The horse car was being driven recklessly and stopped with plaintiff in a position between the heads of the two horses, without contact with the horses. Plaintiff, who was pregnant at the time, fainted and later suffered a miscarriage. There was medical testimony showing that the miscarriage was the result of the mental shock which plaintiff received when placed in this position of danger. Nevertheless, the court dismissed the complaint and held that a plaintiff may not recover for injuries occasioned by fright, where there are no immediate personal injuries. Three reasons were assigned for this holding. First, since one cannot recover for injuries occasioned by negligently caused fright alone, there could be no recovery for the consequences of such fright. Second, the

1. 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).
2. 17 Misc. 2d 548, 184 N.Y.S.2d 1016 (1959).
3. 11 App. Div. 2d 613, 200 N.Y.S.2d 852 (1960).
4. 151 N.Y. 107, 45 N.E. 354 (1896).
5. *Supra* note 1.
6. *Supra* note 4.
7. *Ibid.*

consequential injury is too remote, and hence not proximately caused. Third, to allow recovery would be against public policy. The public policy argument is broken down into three phases: this type of injury could be easily feigned and would promote fraud; the door would be opened to a flood of litigation; and damages must rest on speculation.

The *Battalia* court passes quickly over the first two reasons saying, "It is threshing old straw to deal with them."[8] Although this is true, it has not been the New York courts which have destroyed these arguments. The nearest which any New York court came to repudiating them was in the case of *Comstock v. Wilson.*[9] Here a woman fainted and fell to the sidewalk, thereby fracturing her skull. This blackout occurred after a collision between defendant's car and a car in which plaintiff was riding. The woman died twenty minutes after the fall. The court found impact and granted recovery, and all but the public policy arguments of the *Mitchell* case were rejected. They were only referred to in the court's statement, "The conclusions of the Mitchell case cannot be tested by pure logic."[10]

The best answer to the objection that if you cannot recover for fright alone, then you cannot recover for the consequences of fright, was set forth in *Alabama Fuel & Iron Co. v. Baladoni.*[11] The court reasoned in this case that when you deal with fright alone, you are dealing with a metaphysical entity, something entirely subjective instead of objective. Where the damages are only speculative, you cannot measure them. But where you are dealing with the physical consequences of fright, the damages *are* physical and objective and are measurable as if they had resulted from an impact or blow.

Mitchell's second objection is that the injury consequential to the fright is too remote and hence not proximately caused. One answer to this objection is that the chain of causal connection between the wrongful act and the injury to the body is not broken whether the link is fright or impact.[12] A second answer, given in *Jones v. Brooklyn Heights R.R.*,[13] is that courts allow recovery for physical injuries where the fright is accompanied by impact. In the latter case, plaintiff was hit on the head by a small incandescent light bulb which fell from the roof of defendant's car in which the plaintiff was a passenger. Plaintiff was allowed recovery for a miscarriage brought on by the shock which was stimulated by the injury. Thus New York courts are saying fright is too remote and not proximately caused where

8. Battalia, *supra* note 1, at 36, 176 N.E.2d at 730.
9. 257 N.Y. 231, 177 N.E. 431 (1931).
10. *Id.* at —, 177 N.E. at 432.
11. 15 Ala. App. 316, 73 So. 205 (1916).
12. Pankopf v. Hinkley, 141 Wis. 146, 123 N.W. 625 (1909).
13. 23 App. Div. 141, 48 N.Y. Supp. 914 (1897).

there is no impact. But they allow recovery for the fright in other cases where there is a slight impact, and where the fright is just as remote.

This brings us to the argument that to allow recovery without impact would be against public policy. The *Battalia* court feels that all three prongs of this argument are subject to challenge. To the objection that to allow recovery would promote fraudulent claims, the court of appeals answers "that fraudulent accidents and injuries are just as easily feigned in slight-impact cases, wherein New York permits recovery."[14] For example, a plaintiff could just as easily feign an injury where a falling lightbulb grazes his head, as where the light bulb just misses his head. The question of falsity of a claim is a question for the jury.

"The doctrine of expediency or public policy is a doctrine that should be very sparingly and cautiously employed, for if a person's rights have been unlawfully invaded, it would ill become a court of justice to withhold its remedy on the ground of expediency."[15] This statement is the answer to the objection that to allow recovery without impact would expose the courts to a flood of litigation. The remaining branch of the public policy argument, that damages are somewhat speculative and difficult to prove, is discussed in *Ferrara v. Galluchio*[16] and in *Battalia*. The court states in *Battalia* that this is the only substantial policy argument of *Mitchell*. However, the court goes on to say, "The question of proof in individual situations should not be the arbitrary basis upon which to bar all actions."[17] It is the function of juries to determine whether damages have been proven and what the compensation should be. Damages are allowed where there is a slight impact accompanying a nervous shock. They are just as difficult to measure where there has only been this slight impact.

The overruling of the *Mitchell* case represents the termination in New York of thirty-five years in which the "impact" doctrine had been in a state of decay. Oddly enough, the first change which occurred in the *Mitchell* rule made the immediate physical injury requirement more stringent. *Hack v. Dady*[18] held that bodily injury must not only accompany the shock, but also must, at least in part, *cause* the shock in order to enable the plaintiff to recover for the shock and its effects. Here a few drops of molten lead fell upon the clothes and one hand of the plaintiff, due to the negligence of the defendant. When the plaintiff suffered a miscarriage, recovery was allowed for both the miscarriage and the shock, as the injury resulting from the molten lead on the hand was at least a partial cause of the shock. The rule

14. Battalia, *supra* note 1, at 37, 176 N.E.2d at 731.
15. Alabama Fuel & Iron Co., *supra* note 11, at —, 73 So. at 207.
16. 176 N.Y.S.2d 996 (1958).
17. Battalia, *supra* note 1, at 38, 176 N.E.2d at 731.
18. 142 App. Div. 510, 127 N.Y. Supp. 22 (1911).

set forth in the *Hack* case was reiterated in *Tracy v. Hotel Wellington Corp.*,[19] where plaintiff suffered both actual immediate physical injuries as well as fright, causing further physical injury. The court held there may be a recovery, where both bodily injury and fright concur in producing nervous shock giving rise to injury.

The erosion of the *Mitchell* doctrine began in 1925, in the supreme court case of *Sider v. Reid Ice Cream Co.*[20] Here plaintiff became nauseous when she found an insect in some ice cream she was eating. The supreme court found immediate physical injury and held that where there is a physical injury caused by the negligence of the defendant, accompanied by fright producing illness, recovery may be had both for the physical injury and the consequences of the fright. The court openly criticizes the *Mitchell* case, saying, "There is now no need for the Mitchell rule on the score of public policy or necessity."[21] This is a case where the court is not forced by the facts to follow *Mitchell*, but still takes an opportunity to express its dissatisfaction with it.

It is important to note that the *Mitchell* court does not use the word "impact." Instead, it uses the terminology "immediate physical injury." Since it is possible to have impact without injury, it could be said that *Mitchell v. Rochester R.R.* did not establish the impact rule, but was merely a forerunner of it. The words "physical impact" are used for the first time in the *Comstock* case.[22] It would therefore be proper to credit the *Comstock* case with founding the "impact doctrine" in New York. However, no authorities or courts seem to have ever made any distinction between the terms "impact" and "immediate physical injury." These terms are treated synonymously and used interchangeably.

If a jurisdiction which adheres to the impact requirement should decide in the future to differentiate between the two terms, the scope of recovery would be expanded to those plaintiffs who have received impact, but no immediate physical injury. This may be illustrated by assuming a situation where plaintiff is brushed by a speeding car, but there is no immediate physical injury. Plaintiff is frightened and the fright aggravates a heart condition. Plaintiff is subsequently hospitalized and suffers increased pain. Here, under a strict construction of the *Mitchell* doctrine, recovery would have to be denied, as there is no "immediate physical injury." Under the *Comstock* decision, there could be recovery as there was "impact."

Where the defendant's negligence inflicts an immediate physical injury, such as a wrenched back, the courts allow compensation for purely mental

19. 188 App. Div. 923, 176 N.Y. Supp. 923 (1919).
20. 125 Misc. Rep. 835, 211 N.Y. Supp. 582 (1925).
21. *Id.* at —, 211 N.Y. Supp. at 583.
22. Comstock, *supra* note 9, at —, 177 N.E. at 433.

elements of damage accompanying it, such as fright at the time of the injury.[23] Thus there is no need for impact where there is an accompanying physical injury. This illustrates that the courts use the term "immediate physical injuries" in two different contexts. First, they use it interchangeably with the word "impact" in situations where there is no accompanying bodily damage at the time of the fright. Second, they use it in instances where there is bodily damage accompanying the fright.

After *Comstock*,[24] the stage was set for the *Battalia* decision in *Ferrara v. Galluchio*.[25] In a malpractice suit against a physician, a patient recovered damages for a severe case of "cancerophobia" which developed as a result of negligent therapy. It was evident from the majority opinion in the *Ferrara* case that the *Mitchell* doctrine was no longer heeded in New York. The court said, "Freedom from mental disturbance is now a protected interest in this state."[26] The court went on to remove the remaining branch of the public policy argument in *Mitchell* by stating that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, but said "that it is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case."[27] Here the guarantee of genuineness of the cancerophobia was found in the circumstances of the case. In allowing recovery, the court was proceeding squarely against the rules of the *Mitchell* and *Comstock* cases which state that there can be no recovery for emotional disturbances arising out of negligent conduct, unless there is either "immediate physical injury" or "impact." Here there was neither. The court did not overrule *Mitchell*, but simply ignored it. The express abrogation occurred three years later when the court of appeals in *Battalia* stated, "It is our opinion that Mitchell should be overruled."[28]

In Pennsylvania, the first case in this area was *Ewing v. Pittsburgh C. & St. L. Ry. Co.*[29] Here two of defendant's railroad cars collided and fell from the tracks against the dwelling house of the plaintiff. Plaintiff was subjected to great fear, fright, and alarm. He consequently became sick and permanently disabled. The Supreme Court of Pennsylvania held that fright unaccompanied by some injury to the person does not provide grounds for recovery, even though there are later physical injuries. The reason assigned for this holding is that the permanent injury could not have been foreseen,

23. PROSSER, TORTS 178 (2d ed. 1955).
24. See text accompanying note 9, *supra*.
25. *Supra* note 16.
26. *Supra* note 16, at 999.
27. *Ibid.*
28. Battalia, *supra* note 1, at 35, 176 N.E.2d at 730.
29. 147 Pa. 40, 23 Atl. 314 (1892).

as it was not one which was likely to result from the collision; hence, it was not the proximate cause of the permanent injury. This case was decided four years before the *Mitchell* case. The *Mitchell* argument, that the consequential injury is too remote and hence not proximately caused, is based on the same reasoning as in the *Ewing* case.[30]

The court does not mention the word "impact" in *Ewing*, but stated that fright must be accompanied by some injury to the person. Since it is possible to have impact without injury, it appears that the *Ewing* court, like the *Mitchell* court, would not allow recovery for fright when accompanied by impact, but without an accompanying injury.

Pennsylvania did not adopt the public policy argument set forth in the *Mitchell* case until *Huston v. Freemansburg Boro.*[31] In this case, plaintiff's husband who was recovering from an attack of typhoid fever became mentally distressed from the noise of dynamite blasting by the defendant borough and died shortly thereafter. The court denied recovery, assigning as their reason: the courts would be flooded with an increase in litigation, much of which would come as a result of feigned injuries. Chief Justice Mitchell went on to describe mental disturbance as a cause of action as "so intangible, so untrustworthy, so illusory, and so speculative."[32]

Even in *Huston*,[33] the court makes no mention of the word "impact." This word did not appear in Pennsylvania until *Potere v. City of Philadelphia.*[34] Here, the mental anguish and fright of the plaintiff was accompanied by some immediate physical injury resulting from actual impact. The court held that where plaintiff sustains bodily injuries, no matter how trivial, and there is a slight impact upon his person which is accompanied by fright or mental anguish directly traceable to the peril in which the defendant placed himself, the mental suffering is a legitimate element of damage. This case can be distinguished from the *Ewing*, *Mitchell*, and *Battalia* cases in that here the physical injury occurred simultaneously with the fright and was not a consequence of it. But *Potere* is important, because it incorporates the use of the word "impact" into the law of Pennsylvania.

This brings us to the case cited by Justice Van Voorhis in his dissent in *Battalia—Bosley v. Andrews.*[35] This is a statement of the present law of Pennsylvania. Here plaintiff suffered a heart disability resulting from fright and shock upon being chased by a trespassing bull which did not touch her. The court held that there could be no recovery of damages for

30. *Ibid.*
31. 212 Pa. 548, 61 Atl. 1022 (1905).
32. *Id.* at 550, 61 Atl. at 1023.
33. *Supra* note 31.
34. 380 Pa. 581, 112 A.2d 100 (1955).
35. 393 Pa. 161, 142 A.2d 263 (1959).

injuries resulting from fright or nervous shock, or mental or emotional disturbance, unless accompanied by physical injury.

Justice Bell in the majority opinion wrote that to allow such recovery would open "Pandora's box."[36] He then attributes the following reasons to the holding. First, for every genuine and deserving claim, there would likely be a tremendous number of illusory or imaginative or faked ones. Second, medical science is unable to prove that ulcers, fainting spells, and even serious injuries, such as heart attacks, were *not* caused by the defendant's negligent act. The first rationale is the old public policy argument of the *Mitchell* case. The fallacies of this contention have been previously examined. The second reason deals with disproof and is a variation of the proximate cause argument in the *Mitchell* case. The defendant does not have the burden of proving that the consequential injuries were not caused by the fright, but rather, the plaintiff must prove that they were. Granted, the plaintiff has a better chance of convincing a jury that the fright was the proximate cause of the consequential injury if the defendant is unable to invoke the aid of contrary medical testimony; but proximate cause is only one element that must be proven before recovery can be granted. The reasoning of the majority appears to be in accord with the usual reluctance of the courts to depart from long-established precedent.

While New York is now in agreement with the *Restatement* view on "impact," Pennsylvania still adheres to the old rule.[37] The *Restatement* repudiates the *Mitchell* doctrine when in a comment it uses the facts of that case to illustrate a situation where the defendant should be liable.[38] It explicitly imposes liability on a defendant whenever he unintentionally causes emotional distress to another if he ought to have realized that his actions involved an unreasonable risk of causing such distress, except by knowledge of the harm or peril of a third person, and if he should have realized from facts within his knowledge that such distress might result in illness or bodily harm.[39] It is also expressly provided that the fact that any injury or harm results from the internal operation of fright or distress does not relieve the defendant of the liability therefor.[40]

---

36. *Id.* at 168, 142 A.2d at 266.

37. *Supra* note 35.

38. RESTATEMENT, TORTS § 346, comment *c* (1948).

39. *Id.* § 313, states that:

If the actor unintentionally causes emotional distress to another, he is *subject to liability* to the other for resulting illness or bodily harm if the actor (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm. (Emphasis added.)

40. *Id.* § 346, states that:

If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or

It is submitted that the Supreme Court of Pennsylvania might well consider the impact rule in light of the fundamental common law rule that permits recovery for every wrong. It should ask whether it is better to deny meritorious claims in order to prevent the perpetration of false ones, or whether it is better instead to permit compensation of the meritorious claims and rely on the safeguards of the trial system to weed out the fictitious claims, one of the purposes for the system's existence. If the court chooses the latter alternative, it would then be administering justice and not a staid inflexible body of rules.

JAY H. CONNER

---

other similar and immediate emotional disturbance, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.